IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITIONER'S BRIEF.

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October 10, 1944.

INDEX.

	Page
Official report of opinion below	2
Jurisdictional statement	2
Concise statement of the case	2
The complaint	2
The Board's decision	4
Brief statement of the issues	5
Brief narrative of the facts	7
The settlement agreement	11
Strike settlement	12
The closed shop contract	13
Specification of errors	17
Errors on issues of fact	17
Errors of law (closed shop)	18
Errors in respect to administrative discretion of the Board	19
Argument	20
Introduction	20
I. The court erred in holding that it was within the administrative discretion of the Board to disregard the strike settlement agreement approved by the Board and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily" and in holding that administrative orders of the Board may be disregarded but not "lightly"	24
II. The court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent, more especially because all of the evidence is to the contrary	39

III. Far from being an unfair practice, the decision of the employer to abide by its contract was correct in this case for the following reasons:

(a) The employer in making the closed shop contract in this case did no more than it was obliged to do, and the court's opinion to the contrary is in error 48

(b) The employer was supported by two well-settled principles of law, namely, that a union has exclusive control of admission to its own membership, and, second, that the National Labor Relations Act enjoins upon an employer absolute non-interference in respect to membership or non-membership in a union. Failure to comply with a closed shop contract with a certified union is an unfair practice 52

IV. On the existing authorities quaere whether the court should hold that it is unreasonable or unlawful for a union to exclude from its membership members of a rival union or employees otherwise hostile 54

V. (a) Even if the exclusion from membership in the union were unreasonable, the act is that of the union and not that of the employer, for there is no evidence of discriminatory intent on the part of the employer 67

V. (b) Absent conspiracy, as in this case, or any evidence of malice, the cases hold an employer exempt from liability for the exclusion of members by a union due to factional conflict or otherwise, even when the exclusion is wrongful 68

VI. The court erred in holding that the closed shop proviso of the National Labor Relations Act,

Section 8 (3), authorizing contracts which require membership in a union as a condition of employment, also requires a union holding such contract to admit all employees of the employer to membership and is not binding on the employer if the union excludes any employee on the ground of hostility of such employees to the union 76

(1) The legislative history of the Act shows that it was the intention of Congress in Section 8 (3) of the National Labor Relations Act to accept the status quo as to closed shop contracts and without extending the legality thereof under state law to authorize employers and unions to make such contracts with all the accepted features thereof 76

(2) The history of labor unions as well as the reported cases shows that the closed shop policy of unions has always included exclusion not only of non-unionists but also members of hostile or rival unions 85

(3) Recent decisions of the state courts have interpreted the closed shop proviso of labor relations acts identical in terms to the National Labor Relations Act to evidence legislative approval of the closed shop with the following results:

(a) The policy recognized is a definite exception to the principle of majority rule otherwise recognized in the Act. (b) State courts which formerly held closed shop contracts to be contrary to public policy in the face of union monopoly of the employment, now no longer recognize monopoly as a ground for invalidating closed shop contracts 92

VII. The problem here presented is for the legislature and not for the courts: The National Labor Relations Act does not purport to regulate unfair labor practices of labor unions, a deficiency which has been recognized and repaired in recent state legislation by statutes invalidating closed shop contracts where it is shown that the union unreasonably excludes employees from membership; also by statutes limiting racial and other discriminatory exclusions, thus indicating that legislative action is necessary 98

VIII. The Court erred in its failure to recognize that the Board in this case was passing upon the validity of its own acts and in such a case should not be entitled to the benefit of the presumption that its findings are valid if supported by substantial evidence, but, on the contrary, all the evidence should be considered 105

Conclusion 109

Cases Cited.

Acierno v. North Shore Bus Co., Inc., and Amalgamated Assn. of Street Ry. etc. Employees (Sup. Ct. of Kings County 1939), 17 N. Y. Sup. (2nd) 170, 173 Misc. 79 .....

Ansley Radio Corp. and Local 1221 United Electrical and Radio Workers of America, CIO, 18 N. L. R. B. 1023 ..... 73, 90

Armant v. Cannon Employees Assn. (Superior Ct. Los Angeles County 1942), 11 Labor Relations Reference Manual 752 .....

Blakeney et al. v. California Shipbuilding Corp. et al. (Cal. Superior Ct., Los Angeles County, 1944), reported in 14 Labor Relations Reporter 796 69

Cameron v. International Alliance of Theatrical Stage Employees (1935), 118 N. J. Eq. 11 64
Carroll's Transfer Co., 14 Labor Relations Reports, Supplement of June 19, 1944, 56 NLRB, #168 53
Chicago, Milwaukee & St. Paul R. R. Co. v. Hemen Clark, 178 U. S. 353, 44 L. Ed. 1099, l. c. 1107 ..... 34, 35
Curran v. Galen, 152 N. Y. 33, 46 N. E. 297 95
Dorrington v. Manning (1939), 135 Pa. Superior Ct. 194, 4 Atl. (2d) 886 66
Exchange Bakery etc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 96
F. F. East Co. Inc., v. United Oystermen's Union (1941), 130 N. J. Eq. 292, 21 Atl. (2d) 799 ..... 65, 96
Fairbanks v. McDonald (1914), 219 Mass. 291, 106 N. E. 1000 ..... 58, 68
Goldfinger v. Feintuch (1937), 276 N. Y. 281, 286, 11 N. E. (2d) 910, 913 104
Greenwood v. Building Trades Council of Sacramento (App. Dist. Cal. 1925), 71 Cal. Appl. 159 ..... 52, 53
Hamer v. Nashawena Mills, Inc., et al. (1943), 52 N. E. (2d) 22 93
Hathaway Bakeries, Inc., v. Labor Relations Commission (1944), 55 N. E. (2d) 254, ... Mass. ... 93
Hudson Bus Transp. Drivers v. Hill Bus Co. (1937), 121 N. J. Eq. 582, 191 Atl. 763 65
Interborough Rapid Transit v. Lavin (1928), 247 N. Y. 65, 79, 159 N. E. 863, 868 104
Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 96
Kingston Trap Rock Co. v. International Local 825, 129 N. J. Eq. 570, 19 Atl. (2d) 661 97
Lohey et al. v. Wilson Storage & Transfer Co. et al. (C. C. A. Minnehaha County, S. D. 1944), 14 Labor Relations Reporter 745 71

M. & M. Woodworking Co. v. N. L. R. B. (C. C. A. 9th 1939), 101 Fed. (2d) 938 ..... 34, 52
Maguire v. Buckley, 301 Mass. 355, 17 N. E. (2d) 170 53
Mayer et al. v. Journeymen Stone Cutters Assn. (1890), 47 N. J. Eq. 519, 20 Atl. 492 52
Miller v. Rueb (Supreme Ct. Erie County 1938), 166 Misc. 479, 2 N. Y. S. (2d) 394 ..... 52, 62, 99
Modern Cleaners Co. (1940), Wisc. E. R. B. Decision 129-A 53
Morgan v. U. S. (1938), 304 U. S. 1, 82 Law. Ed. 1129 107
Murphy v. Higgins (N. Y. Supreme Ct. 1939), 12 N. Y. S. (2d) 913 53
N. L. R. B. v. General Motors Corp. (CCA 7th, 1940), 116 Fed. (2d) 306 38
N. L. R. B. v. Gluek Brewing Co. et al. (C. C. A. 8th, August 7, 1944), 8 Labor Cases, Section 62314 ..... 53, 73
N. L. R. B. v. Jones & Laughlin Steel Corp. (1937), 301 U. S. 1, 81 Law. Ed. 893, at 917 ..... 98, 107
N. L. R. B. v. Lion Shoe Co. (CCA 1st, 1938), 97 Fed. (2d) 448 75
N. L. R. B. v. Reblon Products Corp. (CCA 2nd, 1944), 14 Labor Relations Reporter, page 710 38
N. L. R. B. v. Sun Shipbuilding and Dry Dock Co. (CCA 3rd, 1943), 135 Fed. (2d) 15 106
Railway Mail Assn. v. Corsi, 1944, N. Y. Sup. Ct. App. Div., 8 Labor Cases, Sec. 62,311 ..... 102, 103
Rutland Court Owners, Inc., 44 NLRB 587, l. c. 603 ... 89
Scopes v. Helmar (1933), 205 Ind. 596, 187 N. E. 662, 664 104
Shawsheen Dairy, Inc. (1938), Mass. Labor Relations Comm. Case U. P. 241 53
Shein v. Rose (Supreme Court, New York County, 1939), 12 N. Y. S. (2d) 87 57
Shinsky v. O'Neil (1918), 232 Mass. 99, 121 N. E. 790 ..... 58, 59

Shinsky v. Tracey (1917), 226 Mass. 21, 114 N. E. 937 ..... 53, 58
Spayd v. Ringing Rock Lodge (1921), 270 Pa. 67, 113 Atl. 70 104
St. Joseph Stock Yards Co. v. U. S. A. and the Secretary of Agriculture (1935), 298 U. S. 38, 80 Law. Ed. 1032 107
Steele v. L. & N. Rwy. Co. (1944), 16 Sou. (2d) 416 71
Sun Ship Employees, Inc., v. Industrial Union etc. CIO and Sun Shipbuilding and Dry Dock Co. (Pa. Court of Common Pleas, 1944), 8 Labor Cases, Sec. 62341 30
Sweeny v. United States, 17 Wall. 75, 21 L. Ed. 575 (l. c. 576) 35
U. S. v. Abilene & S. R. R. Co., 265 U. S. 274, 286-290, 68 Law. Ed. 1046, 1021-1023 107
United States v. Chouteau, 102 U. S. 603, 26 L. Ed. 246 36
United States v. La Franca, 282 U. S. 568, 75 L. Ed. 551, l. c. 556 36
Utah Copper Co. v. N. L. R. B. (C. C. A. 10th, 1943), 139 Fed. (2d) 788, certiorari denied, 1943, 88 Law. Ed. 841 29
Williams v. Quill (1938), 277 N. Y. 1, 12 N. E. (2d) 547 ..... 95, 99
Wilson v. Newspaper and Mail Deliverers Union of New York, supra (1938), 123 N. J. Eq. 347, 197 Atl. 720 ..... 64, 96

Textbooks and Reports.

11 Amer. Juris. 249 37
Brooks, "When Labor Organizes," p. 224 (Yale Univ. Press 1937) 91
Congressional Record, Vol. 79, Part 7, 74th Congress, first session, May 15, 1935, page 7673 et seq. 80

Handler, "Cases and Material on Labor Law," pp. 62, 67 (St. Paul, 1944) 48, 49, 85
Harvard Law Review, 56 Harv. Law Rev. 584 86
House Report 1147, 74th Congress, First Session, pages 21-22 ..... 78, 83, 84
Newman, "The Closed Union and the Right to Work," 43 Col. L. Rev. 42 103
Pierson, "Collective Bargaining Systems" (Washington, American Council on Public Affairs, 1942) 85, 92
Seidman, "Union Rights and Union Duties," p. 36 (New York 1943) 91
Senate Report 573 of the Committee on Education and Labor, 74th Congress, First Session, page 13 (Serial No. 9879) 78, 81, 82
Stockton, "The Closed Shop in American Trade Unions," Series XXXIX of the John Hopkins Studies, p. 66 88
Toner, "The Closed Shop," pp. 27, 36, 163 (Washington, D. C., 1942) 48, 86, 90
Webb, "Industrial Democracy," p. 213, first published in 1897 86

Statutes.

California Labor Relations Act, Laws of 1939, Chap. 643, Sec. 1735 103
Colorado Labor Relations Act, effective April 1, 1943 100
Illinois Labor Act, Ill. Revised Statutes of 1943 (State Bar Assoc. Ed.), Chap. 29, Sec. 24 (c), Smith & Hurd Ill. Annot. Statutes, Ch. 29, Sec. 24 (c) 103
Kansas, 1941 Supplement to General Laws, Annotated, of 1935, Sec. 44-801; Laws of Kansas, 1941, p. 428 102
National Labor Relations Act, Sec. 8 (3) and 10 (f), 29 U. S. C. 158 and 160 (f) 2, 49, 53

New York Labor Relations Law, Chap. 6, Sec. 43, as added by Chapter 49, Sec. 1, of the Laws of 1940, effective Feb. 14, 1940 102

Pennsylvania, Labor Relations Act, adopted June 1, 1937, Act 294, Public Laws, p. 1168 99

Texas Act Regulating Labor Unions, Laws 1943, House Bill 100 101

U. S. C., Title 28, Sec. 347 2

U. S. C., Title 29, Sec. 160, subsec. (e) 2

Vernon's Texas Statutes, 1943 Supplement, Laws 48th Reg. Sess., Title 83, Art. 5154a 101

Wisconsin Employment Peace Act, Chap. 111 of Wis. Stat. 100

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PETITIONER'S BRIEF.

This case arises upon a petition filed in the Circuit Court of Appeals for the Fourth Circuit, to review a decision of the National Labor Relations Board in a complaint case instituted by the Board. The petitioner here, and below is The Wallace Corporation (hereinafter called the Company), which is a Missouri corporation operating a plant for the manufacture of clothes pins, wood dishes and other wood products at Richwood, West Virginia, where the Company employed about 200 people.

Official Report of Opinion Below. The opinion of the Circuit Court of Appeals for the Fourth Circuit, dated February 3, 1944, is reported under the title "Wallace Corporation v. National Labor Relations Board et al." 141 Fed. (2d) 87, and appears in the record at page 345.

Jurisdictional Statement. The procedure for such review is provided by Section 10 (f) of the National Labor Relations Act, 29 U. S. C. 160 (f), and the jurisdiction of this Court to review the judgment or decree in question is sustained by Title 28, U. S. C., Section 347, and Section 160 of Title 29, U. S. C., subsection (e).

CONCISE STATEMENT OF THE CASE.

THE COMPLAINT.

The complaint (R. 31) was filed by the Board in June, 1942, upon written charges (R. 38) of Local Union 129, United Construction Workers' Organizing Committee, then affiliated with the C. I. O. (hereinafter referred to as the CIO), and having some connection with District 50 of the United Mine Workers (R. 312). This C. I. O. union had lost an election held with its consent by the Labor Board on the previous January 30, 1942, which election resulted in certification by the Board on February 4, 1942, of a rival independent union known as the Richwood Clothes Pin and Dish Workers Union, Intervenor in these proceedings (hereinafter called the Independent), as exclusive bargaining agent (Pet. Ex. 4, R. 60, Tr. 570). The Independent received the majority vote in the election. The consent election was held pursuant to a formal written agreement dated January 3, 1942, in settlement of a strike, whereby the C. I. O. had agreed with the Company and the Independent that such an election should be held, and (upon the insistence of the C. I. O.) the agreement provided that the prevailing union be given a closed shop contract (R. 55).

The complaint alleged interference and coercion by the Company, also domination of the Independent union. However, it is quite clear that the occasion for filing of the complaint and the principal issue raised thereby was the discharge on March 17, 1942, of forty-three employees of the Company, as alleged in the complaint, "because they were members of" the CIO and "because they were not members of" the Independent Union (R. 35). The complaint mentioned, very briefly, that the Company purported to act under a closed shop contract with the Independent and that the same was "illegal and void." The complaint neglected to mention the fact that the contract was made pursuant to prior agreement and insistence of the CIO with a union certified by the Board as collective bargaining agent.

It is notable that the Board included in this complaint, the charge by the CIO of company domination and interference with the Independent Union, but did not allege that the election and certification were invalid, and indeed the Board itself has in its decision found no infirmity in the election or certification, other than the **subsequent** closed shop contract and performance thereof.

The Board's complaint also neglected to state that in connection with the strike settlement, the CIO had withdrawn, in a formal document approved by the Board, a charge filed with the Board during the strike, alleging that the officers of The Wallace Corporation were sponsoring, aiding and abetting a company union (R. 312).

In other words, after it lost in the election held by the Board, with its consent, the CIO made a charge which necessarily ignored and repudiated the truce and the withdrawal of the same charge. It also repudiated the CIO's own condition, namely, that the union certified should have a closed shop, this change of heart occurring when it appeared the condition was insisted upon by the Independent.

The Board in its complaint sponsored and necessarily supported this repudiation. The Board neglected, as above stated, to mention this strike-settlement agreement and the withdrawal of the charges which are revived in its complaint.

THE BOARD'S DECISION.

After hearing before a trial examiner and argument before the Board on November 11, 1942, the Board wrote a decision dated February 27, 1943, sustaining the complaint. Mr. Leisserson, who heard the case, did not sign this decision and one of the remaining members of the Board wrote a separate opinion. Petition for review was thereupon filed by the petitioner to the Fourth Circuit Court of Appeals. The Board then vacated and set aside its prior opinion and decision and the case was re-argued before the Board on May 13, 1942. After this hearing the Board again sustained the complaint in decision and order of June 7, 1943 (R. 1), which is the subject of the present proceeding for review. The order of the Board requires disestablishment of the Independent, reinstatement of the forty-three employees, with a penalty of what is now several years back pay. The Company protected its position by appropriate motions to dismiss the complaint (R. 47, 169, 285), by appropriate objections to the admission of evidence of facts antedating the settlement agreement (R. 79), by saving exceptions and motions to strike (R. 167, 286), and by its specifications of error (R. 327).

The Court of Appeals refused to disturb the order in opinion dated February 3, 1944, and while showing some sympathy with the petitioner because of its efforts to reinstate the employees, the court said the penalties imposed by the Board were not within the province of the court to disturb.

BRIEF STATEMENT OF THE ISSUES.

The following brief narrative of facts is presented to bring into relief the issues in the case, at the risk of some repetition in the argument. The petitioner contends as the first major issue, that neither the Board nor the Court have met its contention, which is far from a technical one, that the strike settlement agreement, being valid, should not and cannot be set aside, and the prior events re-examined. With respect to events following the settlement agreement of January 13th (R. 54), these were properly examined by the Board and must be here reviewed because the petitioner has challenged as the second major issue both the findings of discriminatory intent in the discharge and the law of the closed shop as announced by the Board and the Court. Both the Board and the Court have found that the Company was guilty of unfair practice in entering into a closed shop contract with the certified union, because it knew and was notified of the hostility between the majority and minority unions and that the majority union would exclude at least some employees to protect its union. On this issue the petitioner contends that it was bound by contract to act as it did, and was not in a position to impose conditions such as an "open union" clause in its closed shop contract, or certainly not required to insist upon them at the risk of further strife, which the company believed would result (R. 224).

As will be more fully set forth in the argument on this point, the Company contends that the closed shop policy necessarily involves exclusion; that a union has full control of its own membership; that the exclusion of members of hostile or rival unions is a common incident in the application of the policy; that the policy necessarily involves discrimination by the union; that, in any event, the employer is forbidden by the law to interfere with

union membership and certainly should not be charged with the responsibility of examining into and passing upon the motives of a union in the determination of its membership, and add employer interference to union discrimination.

It should be noted in this connection that no "conspiracy" between the Independent and the employer had been charged or found by the Board or by the Court below. The Board is confused on this point; it alleges employer "acquiescence" and while denying conspiracy, says the discharge in compliance with the closed shop contract was "because of prior union activity," confusing the union's motives with the employer's. There is nothing in the record to show that when the layoff occurred the employer had knowledge of the reasons for the exclusion, other than the hostility which had been expressed, and no express knowledge of any distinction between CIO members admitted and excluded by the Independent and no knowledge of any distinction between non-members who had been excluded against their wish and non-members who had declined to join the Independent. The finding of the Court below is clearly erroneous on this point. The employer took back all employees after the strike. Many were admitted to the Independent and remained in employment. The employer never showed any signs of discrimination against the CIO in this discharge.

It is realized that a case of this kind does not turn on the niceties of logic. The conduct of the parties throughout this difficulty is necessarily of interest to the Court and has had its effect upon the conclusion of the Court. The Board has suggested in previous argument that the good faith of the employer is not in issue, but obviously the findings of the Board cannot fail to reflect on the ultimate issues. The inquiry here searches the motives of the employer, notably into the problem of its

crimination between employees. It is a question of motive. The gist of the Board's complaint and finding is directed at the **reasons** which prompted the action of the employer. The complaint itself states that the layoff by the employer was "because the employees were members of the CIO," and the Board's conclusion is in this identical language. The petitioner feels impelled, therefore, to discuss the facts and to demonstrate that, as not infrequently happens, it was caught here between two extremes of view, the attitude of a militant CIO union, aggressive even to the point of violence, and the extreme right-wing attitude of the Independent's leadership which considered the CIO to be "radical" (R. 115), backed no doubt by townspeople who deplored the entire shut-down. A great deal has been said and no doubt felt in the case of sympathy for the discharged employees. Little has been said about the hardship of the strike upon the employees, upon the Company and upon the townspeople.

The Company sought to avoid the strike by a Labor Board election at the outset (R. 157). The CIO voted this proposal down (R. 85). The Company settled the strike on the CIO's own terms and it performed its settlement as it felt required to do. Certainly, the drastic penalties now imposed upon it are not warranted on the record.

The following narrative of the facts is directed therefore toward an over-all consideration of the conduct of the parties.

BRIEF NARRATIVE OF THE FACTS.

A campaign to organize the factories, saw mill and timber workers in Richwood was in process in the summer of 1941 by District #50, United Mine Workers of America, and United Construction Workers Organizing Committee (R. 312). A strike was called by the CIO union

on September 25, 1941 (R. 76), which closed the plant for the period to January 13, 1942. The Board in its opinion and findings in this case cites various conversations between certain foremen and members of the CIO, mostly concerning the attitude of the Company's President toward the CIO **prior to the strike.** As admitted by the Board, three out of four of the foremen involved were put on the stand and denied these statements. The Board disbelieves their evidence and credits the CIO members, all highly interested in the outcome of the case. The conversations had reference to the attitude of the Company's officers toward the union. Both the Superintendent of the plant (R. 222) and the President of the Company, who was its sole stockholder, testified on this point and denied that they had ever made the statements in question (R. 278). The President of the Company stated unequivocally that he believed in collective bargaining and did not take an antagonistic attitude to the CIO but was opposed to the closed shop (R. 279), a comment occasioned no doubt by the current discussion of this issue in the steel and mining industries.

At the time the union made its demands and declared the strike there had been a complaint made in respect to one Harvey Dodrill. The merits of this complaint were not revealed in this hearing. Dodrill admitted on the stand, however, that at the time the strike was called it was the position of the Company that they wanted a Labor Board election to determine representation and the CIO was insistent upon a card count (R. 156, 157, 161).

In view of the alleged "anti-union" attitude of the Company, some emphasis should be given to the fact that the Company did not refuse recognition to the CIO but wanted that matter adjudicated by the Board. In view of the fact that the Board only credits the testimony of CIO witnesses in this case, the following testimony on

that point is offered in support of the point that the Company wanted the question determined by the Labor Board, namely, the testimony of this witness, Dodrill, called by the Board, who was President of the CIO at one time (R. 157):

> "Q. Now, Mr. Dodrill, after the strike there were some more negotiations about an election, were there, with your union? A. Yes, sir.
>
> Q. Now, you correct me if I am wrong: Wasn't it about the same way all the way through, that you folks wanted a card count and the Wallace people wanted an election? Isn't that about it, most of the time there? A. Yes, sir."

Mr. Wallace testified that he favored a Labor Board election at the outset (R. 270). Davis, the Superintendent, also so testified (R. 197).

But Griffie, another President of the CIO, also testified that a Labor Board election had been offered and that the CIO voted on the proposal and voted it down (R. 85).

The issue of the strike was recognition of the CIO. The employer wanted a fair determination of majority, to which it was entitled, on a Yes or No election of the type then held by the Board.

From the beginning of the strike to the settlement agreement the evidence of establishment, maintenance or assistance to the Independent Union is of the most tenuous kind. The Independent Union appeared on the scene about October 4, 1942. There is evidence "from which it could be inferred," as the Court says, that the organizers expected that the first meeting was to be held at the house of one of the foremen, but it was not held there (R. 90, 91, 93). It was held at the house of one Landy Groves, a machine tender (R. 89, 102). The meeting was at sea as to what procedure to follow, and Groves' wife, telephoned to Miss Weese, office secretary and man master

of the company, a confidant of the employees in many matters, who was at a meeting of the City Council, for which she acted as Recorder. She referred the inquiry to the Greater Richwood Federation, the local chamber of commerce (R. 232, 233), and as a result B. E. Thompson, the editor of the Nicholas Republican, the local newspaper, was called in and assumed leadership of the Independent. He was connected with the chamber of commerce but not its president at the time (R. 232 and 237). He hired a lawyer (R. 101), one Ritchie, who acted for the union throughout. Immediately after establishment of the Independent, namely, October 9th, the CIO filed its complaint or charge regarding the discharge of Harvey Dodrill and the maintenance of the company union (Bd's. Ex. 5, R. 312, 138). The Independent later, on October 31, 1941, requested certification from the Board, which request was not acted on by the Board (R. 12-13), having asked for recognition by the Company on October 14 (R. 199). During November the Board sent a representative to investigate the charge of domination (R. 138). The President and Vice President of the Company went from St. Louis to Richwood to attend the investigation but received no consideration from the representative of the Board in respect to this investigation, he having already concluded, when called upon to hear witnesses, that the union was company-dominated (R. 201, 272), basing the conclusion on conversations with the CIO. The grounds on which he so concluded, as far as we can judge from the record, is that the Independent was officered by two employees of the company who, while not foremen, he considered represented the company. One of these was Carm Reese, President of the Independent, who was an oiler in the mill room and who had no right to hire and fire or any substantial supervisory duties (R. 206, 207), and the other was Lundy Groves, who was one of four machine tenders in the lathe room and who likewise

had no right to hire and fire but occasionally took the place of the foreman in that department when he was ill (R. 209, 223).

The company's conduct in the subsequent period is not questioned. The strike continued with considerable violence and the Company did nothing to recognize either union. The Company made an effort to get the people back to work, leaving the representation question to be determined in an orderly manner, and so stating in its call (R. 311), but without discrimination as far as the unions were concerned.

THE SETTLEMENT AGREEMENT.

On December 30, 1941, the strike was proceeding into its fourth month and on that date the Company received the following telegram from a CIO representative (Resp. Ex. 6, R. 286, admitted Tr. 571):

"Charleston, W. Va., Dec. 30.

Charles Davis, General Manager,
The Wallace Corporation,
Richwood, W. Va.

In the interests of national unity, for the sake of harmony and to prevent the possibility of bloodshed, if and when you attempt to open your plant, I have influenced your workers to make you a further compromise proposition, which is as follows: Local Union 129, UCWOC, will agree, with the approval of the National Labor Relations Board, to enter into a consent election, with you and your company union, on the condition that when we prove a majority and become the exclusive bargaining agency for all your employees, that as a condition of employment all eligible employees must become members of Local Union 129, UCWOC. Wire answer.

George J. Titler,
Field Representative UCWOC."

While this proposal was rejected until law and order were restored in Richwood and the Independent's consent obtained (see Board Opinion, R. 14), it became the actual basis for a settlement on the following January 13th. The telegram evidences the bitterness of feeling and also the original insistence of the CIO upon a closed or union shop. It also indicates the confidence of the CIO that it would prevail in an election. It also evidences the contention of the CIO even at that time that the Independent was a "company union." Formal charges of company domination had theretofore been filed by the CIO and the investigation by the Board resulted in the conclusion of the Board's representative that the charges were justified.

STRIKE SETTLEMENT.

Following this telegram negotiations in settlement of the strike were opened, and in the early morning hours of January 13th the CIO and the Independent and the Company signed an agreement (R. 54, Tr. 570) that the plant should be opened at 8 a. m. the same day; that everyone would return to work; that the Company would not influence in any way its employees for or against either union and the unions would not exercise any coercion. The Company agreed to recognize, as exclusive bargaining agent, whichever union was proved, by a vote conducted by the Board, to represent a majority of its employees and to start negotiations immediately after the result of the election was determined and to grant a union shop. The following clause about the union shop was contained in the settlement agreement (R. 55).

> "The company further agrees that if either union is proven to represent a majority of its employees, by said vote, it will recognize a union shop, providing

that the company shall at all times retain the right to suspend, hire (sic) or discharge any employee for proper and just cause."

Wage adjustments were to be retroactive.

Following the settlement, the parties appeared at the office of the Board's Regional manager and read the settlement agreement (R. 275). Thereupon two agreements were drawn, dated January 19th, one to "dispose of" and for withdrawal of the charges of domination and other charges (R. 53), and the other for a consent election in customary form (Resp. Ex. 3, R. 56, Tr. 570). Both agreements were approved by the Board's Regional Director in writing after signature by all the parties. The charge involving Dodrill was left to the Board's decision.

The employees all returned to work without distinction as to union affiliations and the election was held on January 30th. No formal objections were filed and the Board, on February 4th, certified the Independent as the exclusive bargaining representative for the employees in the plant (R. 60). The Special Examiner for the Board who heard the case purported to find acts intervening between the date of the settlement agreement and the election evidencing a breach by the petitioner of its agreement not to interfere or discriminate in any way. The Board, however, in its majority decision, considered the events "too trivial to justify setting aside the settlement" (R. 24) and the Board has accordingly disposed of this issue.

The Closed Shop Contract.

In the strike settlement of January 13th the Company had agreed, immediately after the selection of a bargaining agent, to open negotiations and reach a wage settlement to be retroactive to January 13th. The language of this settlement agreement providing for the closed shop is set forth above. Negotiations extended from February

4th to March 7th when the final agreement was signed. (See Agreement R. 61, Tr. 570). The evidence is uncontradicted that the Company was reluctant to enter into a closed shop agreement. Mr. Thompson testified that The Wallace Corporation opposed the closed shop clause in the negotiation of this contract (R. 109). He said: "Mr. Wallace very vigorously opposed it." Mr. Christmas, vice-president of the Company, stated that one of the reasons why the first draft of the contract with the Independent was rejected was because it contained the closed shop clause (R. 263). The Independent was, however, insistent upon the closed shop clause and to show that the Independent was so insistent the Company introduced in evidence at the hearing Exhibit 8 (R. 287, Tr. 571), a letter dated February 28, 1942, a week before the contract was finally signed, on the letterhead of the Nicholas Republican, and signed by Thompson for the Independent Union which gives the Independent's reasons for insisting upon the closed shop. He characterized the clause as one of the "musts" in the contract and said that no counter-bargaining propositions which might exclude it would be agreed to. He calls attention to the fact that his union was certified and mentions the fear of members of the union that several new employees had been given jobs who were favorable to the CIO. He said he was afraid his majority would be jeopardized. He said the only protection he could see for the new union was the closed shop clause and cites the authority of a "research institute." His emphasis was on additional employees. He then refers to present employees "whom our members have declared by unanimous ballot they will not work with, whose presence at the plant is unfavorable to our interests."

The contract which was signed by the Company contains a union shop or closed shop clause by which the Company agreed that all of the employees of the Company should be members of the union in good standing.

After the contract was signed the Company posted the union's notice to employees of the terms of the contract (Resp. Ex. 2, R. 291, Tr. 612). This notice referred to the provisions of the contract and notified all employees to govern themselves accordingly.

When the ten days expired which was given to employees in which to join the union, forty-three employees were laid off by the Company. In view of the statement of the court below, that the Company at this time "knew that thirty-one of these employees had applied for membership in the Independent and had been rejected," it is well to state at this time that there is no evidence whatever in the record to show that the Company knew how many employees had refused to join the union and how many had been refused admittance. The facts in the matter were stipulated into the record at the hearing before the Board beginning July 9th by request of counsel for the Board. It was stipulated at the hearing that twelve of the forty-three did not apply for membership in the union and that thirty-one applied and their applications voted upon by members of the organization in the regular manner as provided by the constitution and by-laws of the union but said application did not receive the required number of votes to permit them to become members (R. 98, 99, 100). There is no evidence in the record that the Company knew these facts at the time and there is no evidence that the Company knew anything about the membership affiliations of the men and women who were excluded by the union. The evidence in the record is even meager that the excluded members were members of the CIO but there is no evidence that the Company even knew that they were CIO members. They had all been working up to that time.

The evidence of the attitude of the Company's officers when they heard of the lay-off is clear. Mr. Wallace testified that the Regional Director called him by long distance

telephone and informed him of the facts and he stated he did not believe it, but after confirming the facts he took action to try to get the people reinstated (R. 278). He investigated and counsel reported the results ten days later (Resp. Ex. 27, R. 307, Tr. 939). The attorney for the Company went to Cincinnati to talk to the Regional Director about the matter and conferred with Thompson and his attorney representing the Independent union, without result.

The attitude of the Company is fairly well set forth in Respondent's Exhibit 9 (R. 289, Tr. 571). The facts in this matter are discussed in more detail under Point II of the argument below. There is no doubt, however, that the Company protested and sought to get the Independent to reinstate the employees, orally and in writing, and even at the eve of trial the Company declared that it was ready to take any steps necessary to put the people back to work and suggested that the Independent confer with the Board and attempt to make arrangements to this end (R. 68, 69). The Independent's proposal was not satisfactory to the Board (R. 70). The Board's proposal was not satisfactory to the Independent (R. 70). The Company was left in the middle.

There is also no doubt that the act of excluding the employees from membership in the Independent was the act of the membership of the Independent. The stipulation and evidence both support the conclusion that the employees excluded were excluded by vote of the membership (R. 99).

SPECIFICATION OF ERRORS.

The petitioner will rely in its argument upon the following specifications of error, as set out in the petition for certiorari and amply covered in the errors assigned in the Petition to Review in the court below (R. 327).

Errors on Issues of Fact.

1. The Court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent.

2. The Court erred in respect to the following erroneous conclusions which are unsupported by the evidence:

(a) That at the time the Company discharged the forty-three employees "it knew that thirty-one of these employees had applied for membership in the Independent and had been rejected";

(b) That the Company "acquiesced in the conduct of the Independent union" for the reason that (to the extent that such finding implies silent approval or absence of protest) there is no evidence to support such conclusion and for the further reason that such holding ignores the admitted fact that the Company was bound by the strike-settlement to make a union shop contract and bound by such union shop contract to deny employment to non-member employees;

(c) That the conduct of the Company was "oppressive and high handed" for the reason that there is no evidence to support such conclusion and for the further reason that said conclusion is inconsistent with the Court's later statement that the conduct of the Independent union was high handed and that the Company merely acquiesced in the same.

Errors of Law (Closed Shop).

3. The Court erred in holding that a closed shop or union shop contract authorized by section 8 (3) of the Act was invalidated by knowledge on the part of the employer, of the intention of the union to exclude from membership employees hostile to the union (members of a rival union which had conducted a violent strike) and in holding that the Company was under a duty to disregard its union shop contract in order to "protect" such excluded employees and under a duty to insist upon their admission to the union.

4. The Court erred in holding that the closed shop proviso of the National Labor Relations Act [Section 8 (3)] validating contracts which required membership in a union as a condition of employment also requires a union holding such contract to admit all employees of the employer to membership if they apply and is not binding on the employer if the union excludes any employee on the ground of hostility of such employee to the union.

5. The Court erred in holding that the discharge of eleven out of the forty-three employees of the Company who were non-members of the union was discriminatory, it being stipulated and conceded that said eleven employees never applied for membership in said Independent union, for the reason that there is no evidence to support the charge of discrimination and for the further reason that even under the theory of the Court there was no act of discrimination against said employees on the part of either the Independent or the Company.

6. The Court erred as a matter of law in holding that the closed shop proviso of the Act [Section 8 (3)] was never intended to authorize the majority (referring to the majority union) to exclude and thereby discriminate against a minority (referring to the members of the minority union) because the majority concluded the minority

were hostile to the majority union—for the reason that the Act does not purport to regulate and prohibit unfair labor practices of union organizations and expressly legalizes a closed shop contract.

Errors in Respect to Administrative Discretion of the Board.

7. The Court erred in holding that it was within the administrative discretion of the Board to disregard the strike-settlement agreement approved by the Board, and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily," and in holding that such administrative orders of the Board may be disregarded, but not "lightly."

8. The Court erred in sustaining the Board's denial of the petitioner's motions to dismiss, for the reasons (a) that it was an abuse of administrative discretion for the Board to file and prosecute a complaint involving charges of domination of an alleged company union when the same charges had been previously withdrawn, with the full knowledge of the facts and approval of the Board, pursuant to a written strike settlement of which the Board was fully advised; and (b) that the Board's certification, after a consent election was, absent some unfair practice or assistance affecting the election, conclusive as to all parties, of the capacity of the union to make a closed shop contract, and not subject to be set aside by reason of facts antedating the consent election agreement and known to the Board.

9. The Court erred in its failure to recognize that the Board in this case was passing upon the validity of its own acts, and in such a case should not be entitled to the benefit of the presumption that its findings are valid if supported by substantial evidence, but on the contrary, all the evidence should be considered.

ARGUMENT.

Introduction. The petitioner, pursuant to its specifications of error in the Petition for Certiorari, argues first, that the settlement contract of January 13, 1942, was a valid and binding contract and that it was not within the power of the Board to disregard such an agreement and its subsequent performance, such invalidation of the contract being an abuse of administrative discretion. Second, the petitioner challenges the finding of the Board that there was in fact any discriminatory intent in the discharge of the employees in this case and contends that they were discharged not because of prior union activity or affiliation but because of the closed shop contract; there is no evidence to support the Board's finding whatever, but only evidence to the contrary. The third point of the argument brings us down to the position of the Board and the Court that the closed shop contract was illegal and constituted an unfair labor practice in and of itself because of the knowledge of the employer that the union proposed to exclude hostile employees.

On this latter point the petitioner first proposes to show that far from being an unfair labor practice, the employer was correct in its solution of the dilemma in which it was placed, namely, the choice of violating its contract for a closed shop and facing further strikes on the part of the majority union, or, in the alternative, complying with its contract and discharging non-members of the union even though the demands inflicted hardship upon such non-members. In support of the reasonableness of its action, the petitioner will show that it was supported by two undisputed principles of law, namely, the undoubted control of a union of admission to its own membership, and second, the injunctions of the National Labor Relations Act upon an employer not to interfere in union membership. In further support of its position the petitioner will

review the somewhat meager authorities as to the right of a union to exclude from membership employees who are members of a rival union or otherwise considered hostile to the union's interests. On this point petitioner will show that exclusion from membership by unions under closed shop contracts, with consequent loss of employment, is countenanced by the courts if the policy is based on considerations of the welfare and preservation of the union rather than on personal ill-will or malice. And lastly, the petitioner will show that the decisions have never held an employer liable to penalties or damages where the employer complies with a closed shop contract even where exclusion is unreasonably or wrongfully required by a union. The petitioner will show that the Labor Board and the Court have mistaken the remedy in this case by penalizing the employer for the acts of the Union.

The petitioner will show that the National Labor Relations Act proviso in Section 8 (3) does not change the law of the closed shop but was intended to accept the closed shop policy in status quo, with all its inherent exclusions, and that the closed shop policy was accepted as an exception to the principle of majority rule otherwise recognized by the Act; further, that the trend of the state court decisions on similar closed shop provisos is that such provisions are a public recognition of acceptance of the closed shop contract even in the face of monopoly on the part of the union.

Lastly, the petitioner proposes to show that the problem here presented is for the legislature and not for the courts; that the National Labor Relations Act does not purport to regulate unfair labor practices of labor unions and that this deficiency has been recognized and repaired in recent state legislation by statutes specifically invalidating closed shop contracts where it is shown that the union unreasonably excludes employees from membership, also by statutes limiting racial and other discriminatory ex-

The points of the argument are therefore as follows:

I. The court erred in holding that it was within the administrative discretion of the Board to disregard the strike settlement agreement approved by the Board and to disregard the certification of the Board which followed, and erred in holding that such settlements are not to be observed in all cases but should only be observed "ordinarily" and in holding that administrative orders of the Board may be disregarded but not "lightly."

II. The court erred in holding that there was substantial evidence to support the Board's finding that the Company discharged the forty-three employees mentioned in the order because of prior union activity or with discriminatory intent, more especially because all of the evidence is to the contrary.

III. Far from being an unfair practice, the decision of the employer to abide by its contract was correct in this case for the following reasons:

(a) The employer in making the closed shop contract in this case did no more than it was obliged to do, and the court's opinion to the contrary is in error.

(b) The employer was supported by two well-settled principles of law, namely, that a union has exclusive control of admission to its own membership, and, second, that the National Labor Relations Act enjoins upon an employer absolute non-interference in respect to membership or non-membership in a union. Failure to comply with a closed shop contract with a certified union is an unfair practice.

IV. On the existing authorities *quaere* whether the court should hold that it is unreasonable or unlawful for a union to exclude from its membership members of a rival union or employees otherwise hostile.

V. (a) Even if the exclusion from membership in the union were unreasonable, the act is that of the union and not that of the employer, for there is no evidence of discriminatory intent on the part of the employer.

V. (b) Absent conspiracy, as in this case, or any evidence of malice, the cases hold an employer exempt from liability for the exclusion of members by a union due to factional conflict or otherwise, even when the exclusion is wrongful.

VI. The court erred in holding that the closed shop proviso of the National Labor Relations Act, Section 8 (3), authorizing contracts which require membership in a union as a condition of employment, also requires a union holding such contract to admit all employees of the employer to membership and is not binding on the employer if the union excludes any employee on the ground of hostility of such employees to the union.

(1) The legislative history of the Act shows that it was the intention of Congress in Section 8 (3) of the National Labor Relations Act to accept the status quo as to closed shop contracts and without extending the legality thereof under state law to authorize employers and unions to make such contracts with all the accepted features thereof.

(2) The history of labor unions as well as the reported cases shows that the closed shop policy of unions has always included exclusion not only of non-unionists but also members of hostile or rival unions.

(3) Recent decisions of the state courts have interpreted the closed shop proviso of labor relations acts identical in terms to the National Labor Relations Act to evidence legislative approval of the closed shop with the following results:

(a) The policy recognized is a definite exception to the principle of majority rule otherwise recognized in the Act.

(b) State courts which formerly held closed shop contracts to be contrary to public policy in the face of union monopoly of the employment, now no longer recognize monopoly as a ground for invalidating closed shop contracts.

VII. The problem here presented is for the legislature and not for the courts: The National Labor Relations Act does not purport to regulate unfair labor practices of labor unions, a deficiency which has been recognized and repaired in recent state legislation by statutes invalidating closed shop contracts where it is shown that the union unreasonably excludes employees from membership; also by statutes limiting racial and other discriminatory exclusions, thus indicating that legislative action is necessary.

I.

The Court Erred in Holding That It Was Within the Administrative Discretion of the Board to Disregard the Strike Settlement Agreement Approved by the Board, and to Disregard the Certification of the Board Which Followed, and Erred in Holding That Such Settlements Are Not to Be Observed in All Cases But Should Only Be Observed "Ordinarily," and in Holding That Such Administrative Orders of the Board May Be Disregarded, But Not "Lightly."

It is a unique feature of this case that the CIO union and the Independent and the Company entered into a formal written agreement in settlement of the strike, dated January 13, 1942 (Resp. Ex. 2, R. 54, Tr. 570). It should be noted that this contract does not purport to compromise or settle any charges of unfair labor practice or of domination. It settles a strike and its issues.

The settlement contract of January 13, 1942, has never been challenged as to validity or fairness. There is in this case no ground for holding that the Company concealed anything from the parties or overreached the parties in inserting the closed shop provision in this contract. The CIO had originated the demand for the closed shop and the Company had opposed it (R. 271); the Independent was at this point indifferent (R. 277). The Board was, although fully advised, not a party to the contract but the Board approved the settlement and was a necessary party to its performance since the contract provided for a consent election and made the Board the arbiter of the problem of bargaining agency.

The strike-settlement agreement is of course fundamental to the case. The subsequent certification by the Board at the consent election was merely a part of the performance of this agreement. And, of course, the execution of a closed shop contract with the Independent was also in performance of this agreement.

The Board is hopelessly confused as to the validity of this contract. The fairest interpretation of its opinion is that while the employer was bound to execute a closed shop contract, it was discharged from this obligation by knowledge of the union's intention to exclude from its membership an undetermined number of employees whom the union considered hostile for reasons undisclosed. The purpose of the union is made the purpose of the employer.

The court on its part, gives the matter scant consideration. The court takes the position that the Company's obligation meant that the employees would be required to become members of the successful union, not that the union had a right to control or exclude from employment. The court characterizes this as "an improper purpose"; that the Company had not agreed to enter into a contract "to do an injustice"; that the Company should have inserted in the contract a provision for the minority "that would have protected their rights."

It should be noted in passing that the court was not very careful in taking this position because it affirmed a penalty against the Company for discharging employees who never even asked for admission to the union. We doubt if the court would go so far as to suggest that it was the Company's duty to insist upon these unwilling employees joining the union as well as to insist that the union admit the members which it excluded. It is clear, however, that the court ignores this obvious distinction.

The nature of the closed shop contracts and the rights of a union to exclude under such a contract are discussed fully in other points of this brief [Infra Points III (3) and IV]. It should be said at this point, however, that the contract in this case contained the obligation and agreement of the Company that all its employees should be members of the union. It did not contain any agreement on the part of the union to admit all employees of the Company. The position of the court results in this holding: that no closed shop contract is valid unless it includes an "open union" clause whereby the union is obligated to admit to membership. There is no such clause in this contract.

The open union clause is occasionally found in closed shop contracts and we take it that the court will recognize that the more liberal unions do not oppose it. It is, however, altogether too idealistic a notion of the policy of the closed shop to assume the open union is a necessary incident thereto. See Points III (3) (e), and IV (2) below.

Unfortunately, the employer in this case was not in a position to prescribe conditions. He had agreed to a closed shop. The employer assumed, and we believe correctly, that the union would retain control of its own membership. The very omission of a covenant on the part of the union to admit all the employees is significant of the intention in this case to adhere to what may be fairly called the general rule.

The Court and the Board alike are most unfair to the employer in this case in assuming that the imposition of such a condition would be a simple matter. Anyone familiar with trade union negotiations knows that in the presence of rival unionism, whether due to jurisdictional disputes or factional strife as that between the CIO and the A. F. of L., or between any affiliated union and an independent union, it is the unions and not the employers who object to the open union clause. The reason: Fear that the union itself will be undermined.

The legal authorities on this matter of the right of a union to exclude are fully discussed under the subsequent points of this brief, with citations of traditional writings on the subject. It would be perhaps a fine thing if trade unions were open to all comers and closed shop contracts were invalidated by any contrary policy. As shown below, that has never been trade union policy, and it is the law only where, in recent years, the legislatures of the states have so decreed.

The injustice which the court and the Board have inflicted upon this employer is the ruling that the employer (his hands tied by the present law protecting trade unions) should be called upon to protect minorities which the law does not protect; that he should be called upon to reform the closed shop policy which is approved by the law; that he should be called upon to supervise membership admission by the union and examine its motives for exclusion when the courts themselves have never undertaken such an obligation; that he should interpret his obligation to make a closed shop contract so as to recognize the right of his employees to join a union when the courts have refused to recognize any such right; that in collective bargaining, faced with an obligation to make a closed shop contract, he should, at the expense of further strife and discord and the closing of his plant, inform one of the factions, after a long and bitter factional strife, and con-

plaints of interference, that he is the judge of whom they should admit to their union.

This section of the brief is, therefore, directed to the question of the validity of the strike settlement and the certification by the Board. The Board itself finds no infirmity in the certification, but it is suggested by the court below that the certification by the Board is the central issue in the case, rather than the settlement contract.

The Certification. Let it be plainly understood that in this case the certification was no mere administrative act of the Board. It was an arbitration, pursuant to the settlement contract, of the question of representation. The certification was a step in the performance of a settlement agreement and the Board participated in it upon terms by which the Board itself represented that the certification disposed of prior charges. In the 8th Annual Report of the National Labor Relations Board, page 49, the Board refers to its policy on consent elections and certifications and says this:

> "However, the Board does not ordinarily order elections in the presence of unremedied unfair labor practices, whether merely alleged or already found by the Board, unless the labor organization which instituted the charges has agreed in advance that it will not rely upon the unfair labor practices as a basis for objecting to the conduct or result of the election. The Board orders an election only when it is satisfied, after considering all evidence, respecting the employer's compliance with a prior order concerning unfair labor practices that an election, free from all employer compulsion, restraints and interference, can be held."

The certification in this case was held on that basis, and the Board insisted upon withdrawal of all pending charges before conducting this consent election and acting as arbitrator of the question of representation. A formal consent

election agreement was executed on January 19, 1942 (R. 56, Tr. 570). At the same time a collateral agreement of the same date was executed by all the parties in which the union requested withdrawal of the charges. This agreement recites that the parties "wished to dispose of such charges in a mutually satisfactory manner." This agreement was approved by the Regional Director of the Board (R. 53-54).

It should be noted also that the company fully performed this agreement on its part; that the Board itself has expressly found no violation of this agreement on the part of the employer by acts intervening between its date and the date of the election.

The Board in its opinion and decision applies to the settlement contract of January 13th the principle which it has announced as to certifications, namely, that if a subsequent unfair practice appears the Board may go back of the certification. This, of course, may be true of an administrative act of the Board in pursuance of its own powers under Section 9 (c) to determine representation. See **Utah Copper Co. v. N. L. R. B.** (C. C. A. 10th, 1943), 139 Fed. (2d) 788, certiorari denied, 1943, 88 Law Ed. 841. But in this case the certification is part of the performance of a contract and was stipulated and agreed to by the parties, and in such case a contractual element is added. The distinction here made has been properly recognized in a state court case where there was a consent election which the independent sought to set aside for unfairness. The federal courts all held that this could not be done because the federal courts had no jurisdiction, but the state court held:

> "This private written agreement is nothing more than an ordinary contract between private individuals for the arbitration or decision by reference of a disputed question."

and held that the court had jurisdiction to determine whether the election was fairly held. **Sun Ship Employees, Inc., v. Industrial Union etc. CIO and Sun Shipbuilding and Dry Dock Co.** (Pa. Court of Common Pleas, 1944), 8 Labor Cases, Sec. 62,341.

It should be noted in our case that the election is not challenged. No objections were filed and the Board finds no infirmity in this arbitration pursuant to the settlement contract. There is no finding of any unfair act between the date of the settlement and the date of the election.

It is, therefore, one thing to go behind a mere finding of the Board in the exercise of its own determination of the bargaining agent, and quite another thing to set aside a settlement contract and disregard an arbitration award which is admittedly valid. The Board takes the position that although the tri-partite agreement was valid when made, performance of its terms did not require the respondent "to become a party to the Independent's plan." The Board says: "On the contrary, when this unlawful scheme became known to it the respondent not only had a right to abrogate the tri-partite agreement, but also was under an obligation to do so." This finding that the company became a party to the "unlawful" act of the union is contrary to the admission of the Board that there was no conspiracy and the same admission of the court. The finding also assumes, without examination, that the act of the union was unlawful simply because the employees had been engaged in a prior conflict. This whole assumption of the Board is challenged in a later portion of this brief.

The Court on its part fails to give any consideration to the question whether it is within the province of the Court, let alone the Board, to set aside a valid contractual settlement agreement, settling three and a half months of industrial strife, and made by the parties with their eyes open.

The fact that the court ignores the gravity of the problem is evidenced by its remark in its opinion: "In the absence of the consent election and the certification of Independent as a bargaining agent by the Board, there could be no question as to the correctness of the Board's order." The settlement contract is not here mentioned as a factor. The court emphasizes the duty of the Board to prevent unfair labor practices and again emphasizes the certification, but not the contract, when it says that the fact that the Board "may have certified a union as a bargaining representative, does not limit its power later to declare such union to be company-dominated and order its disestablishment if such course is seen to be proper in the light of subsequent developments." But here the certification was no mere act of the Board. It was part of a contractual agreement. The only other reference to the contract which is made by the court is in its quotation, with approval, from the Board opinion, of the single sentence: "It is true that under the terms of the election agreement the respondent was bound to execute a union shop contract with the victorious union."

This passage from the decision of the Board indicates again that both the Board and the Court did not meet squarely the problem of the power and propriety of the Board's action in setting aside and vacating a strike-settlement agreement, the validity of which is not challenged in the complaint or questioned on the evidence. The Board's decision fails to disclose any other reason for setting aside the settlement.

The parties knew that unfair practices had been charged and investigated. The Board's agent had conferred with the Company and with the CIO about the charge and it's agent had even tentatively concluded that it was well supported on reasons not satisfactory, it is true, to the Company (Ex. 17, R. 293, Tr. 924). The CIO union had claimed company unionism even in its offer of settlement (Ex. 6, R.

286, Tr. 571). The Company on its part had never recognized the Independent. If any recognition was accorded it, this recognition came from the CIO's proposal and from the Board in insisting upon withdrawal of the charges and the subsequent naming of the Independent in the consent election agreement and on the ballot. There was certainly no misrepresentation and no over-reaching and nothing but reluctance on the part of the Company as far as the closed shop aspects were concerned.

Did the Board and the Court have power to set aside this settlement?

The only express theory of the Board is that subsequent unfair practice (in this case, the performance of the agreement itself) warranted a re-examination of preceding events to find out whether there was evidence of unfair practice preceding the settlement. As above pointed out, it is a far step from the doctrine of the Board's decisions on certifications to the doctrine that the Board may re-examine the basis of a settlement contract terminating a strike.

We have not contended that the certification was a judgment and that the rule of res adjudicata applies. We complain of the unfairness of disregarding the settlement. The bargaining agent might have been determined by a card count or by arbitration. It was far better to call in the Board to conduct a fair election, advising it of what was going on. It is significant that the Board itself refused to conduct such an election unless the charges were withdrawn. As a matter of fact the Board has found no infirmity in the election and certification (R. 24), so that that part of the performance of the settlement contract is eliminated from attack.

If this court is persuaded that the making of the closed shop contract itself, on March 13th, was not an unfair practice in view of the contractual obligation of the Company to make it and in view of the control of the union

over its own membership and the statutory obligation of the employer not to interfere in such matters, then we have to consider solely this question of the right and power of the Board to nullify and set aside settlement contracts of this type. The decision of this question will depend upon a sober evaluation of the conflicting public policies involved. It may be contended that an affiliated union, such as the CIO, fully and militantly represented and aware of the facts is nevertheless a ward of the court and must be protected against its own acts and agreements. On the other hand, the court may take the view that unions such as the CIO should be held to responsibility for their own agreements and that setting aside the same even in the interest of such a policy ignores a principle of fair dealing which transcends economic interest. The public is certainly interested in the prevention of strikes and their peaceful settlement. This is especially true of a strike for recognition, which should be an anachronism, under the ample provisions of the Act to determine the bargaining agent. But more than that, it is public policy that people keep their agreements. The adoption of the more paternalistic ruling would in effect say to the unions and the Board: "You may make and approve settlements of strike situations and if you lose you may repudiate your own recognition of the union and your own agreements and if you win you will be protected anyway."

This petitioner contends that the Board should not be vested with such power and that the peaceful settlement of difficult or doubtful strike situations will not be furthered by a such a policy; observance of contracts is the paramount policy and that if this policy is not followed the whole machinery for the protection of collective bargaining will be useless and futile.

Compromise settlement should be sustained. The Board suggests that the freedom of the collective bargaining

agent is a paramount policy. It is appropriate in this connection to call attention to two other paramount policies in the Act:

1. The purpose of the Act is to promote industrial peace and to prevent the interruption of interstate commerce by industrial strife. The long strike in this case which was conducted by the CIO union called for settlement. It was a hardship on the majority and the minority alike, and in addition it was a hardship on the company. The court should be reluctant to place unnecessary limitations or conditions upon the settlement of such strikes.

2. The purpose of the Act is to promote collective bargaining. It would be futile to encourage collective bargaining and at the same time to encourage the violation of the very contracts which are sought to be consummated through that method.

It is therefore appropriate to cite briefly some of the decisions of this court announcing well-settled rules which favor settlements of all kinds.

A compromise and settlement fairly made with the facts equally known by both parties is a final and conclusive adjustment of their controversy; where it is made between persons legally competent to contract and is supported and founded upon sufficient consideration, it has in certain respects the effect of a judgment between the parties. It operates as a merger of, and bars all right to recover on, the claim or right of action included therein and defenses thereto. The compromise agreement is substituted for the pre-existing claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement (11 Am. Jur. 272).

It was stated by this Court in **Chicago, Milwaukee & St. Paul R. R. Co. v. Hemen Clark**, 178 U. S. 353; 44 L. Ed. 1099, l. c. 1107:

"The general principle applicable to settlements was thus expressed by Mr. Justice Clifford in **Hager v. Thomson**, 1 Black 80, 93, 17 L. Ed. 41, 44:

> "'Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement and afterwards maintain a suit for that which he voluntarily surrendered.'"

Mr. Justice Clifford, in the case of **Sweeny v. United States**, 17 Wall. 75, 21 L. Ed. 575, stated (l. c. 576):

> "Parties may adjust their own disputes, and when they do so voluntarily and understandingly, no appeal lies to the courts to review their mutual decision."

It will not be contended that the settlement of a strike, even if, pursuant to the rules of the Board, the withdrawal of charges of unfair practice are involved, is the same as settlement of the unfair practices. The Board, pursuant to the policy above mentioned, concluded that a fair election could be held notwithstanding the pending charges. It was advised of the settlement contract and participated in the arbitration of the matter of collective bargaining representative.

Nor will it be contended that absent fraud or concealment or over-reaching of some kind, settlement of a strike is contrary to public policy in the same class as the compounding of a felony.

In one case this court has upheld the settlement of statutory penalties collectible in a civil action.

In the case of **United States v. Chouteau**, 102 U. S. 603, 26 L. Ed. 246, Mr. Justice Field, in discussing a compromise between the Government of a penalty with a distiller, states (l. c. 249):

> "The question, therefore, is presented whether sureties on a distiller's bond shall be subjected to the penalty attached to the commission of an offense, when the principal has effected a full and complete compromise with the Government, under the sanction of an Act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty.
>
> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. **To hold otherwise would be to sacrifice a great principle to the mere form of procedure and to render settlements with the Government delusive and useless.**"

This case has been cited with approval by this Court in the case of **United States v. La Franca**, 282 U. S. 568, 75 L. Ed. 551, l. c. 556.

The Board in this case approved and sanctioned the withdrawal of the charges, and as stated above, even required such withdrawal. To nullify such action is to render it futile.

Of course, if there is fraud or deceit practised in arriving at a settlement agreement it may be set aside. How-

ever, it is stated as a rule that compromise of a doubtful claim will not be set aside, except for fraudulent misrepresentation or concealment of facts or for such imposition as amounts to unfair or unconscientious dealings. Clearly in this case the facts were well known to all the parties, including the Board, and there was certainly no finding of fraud or duress.

It may be clearly stated that a compromise or settlement stands upon the same footing as other contracts. Either party may enforce it, or recover damages for its breach. In this case, if the petitioner did not comply with its obligation under the settlement agreement to enter into a closed shop contract with the Independent, it would have been guilty of a breach of contract.

The attitude of the courts to compromise and settlement agreements is well stated in 11 Amer. Juris. 249, wherein it is stated:

> "The law favors the amicable settlement of controversies and it is the duty of the courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. The nature or extent of the rights of each should not be too nicely scrutinized. Courts should and do, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable but highly meritorious. Because they promote peace, voluntary settlements of differences between parties having legal capacity to contract in respect to their rights where all have the same knowledge or means of obtaining knowledge concerning the circumstances involving their rights, and where there are no fraud, misrepresentations, concealments, or other misleading incidents, must stand and be enforced if intended by the parties to be final, notwithstanding the settlement might not be that which the court would have decreed if the controversy had been brought before it for decision."

The situation in our case, involving as it does the settlement of a strike is quite different from the situation existing in such cases as **N. L. R. B. v. General Motors Corp.** (CCA 7th, 1940), 116 Fed. (2d) 306, or in **N. L. R. B. v. Reblon Products Corp.** (CCA 2nd, 1944), reported in 14 Labor Relations Reporter, page 710, where settlement of pending and future charges of unfair practice was the sole matter for consideration of the court. Furthermore, in those cases the Board was not advised of the settlements nor did it participate therein.

The present settlement agreement was read by and discussed with the Regional Director (R. 275, bottom of page) and, as above stated, the Board participated in the performance of the settlement. The Board had in fact sent its agents to investigate the pending charge. While the investigation of the charges of domination were, as claimed by the company, arbitrary and one-sided, it is apparent from the evidence on this investigation that it developed only substantially the same facts as were developed at the hearing where the entire settlement was re-opened and examined. See Wallace Corporation Exhibit 47 (R. 293-5, Ex. 924), reciting the circumstances of the conduct of this investigation and some of the allegations of the Board's agent.

The circumstances not only show that the settlement was open and above-board but the evidence shows that in this case the Board's decision comes very close to repudiation of the acts of its agents. Certainly the Board has approved the repudiation of this settlement by the C.I.O. union and the repudiation of its own agents' acts in participating therein.

II.

The Court Erred in Holding That There Was Substantial Evidence to Support the Board's Finding That the Company Discharged the Forty-three Employees Mentioned in the Order Because of Prior Union Activity or With Discriminatory Intent, More Especially Because All of the Evidence Is to the Contrary.

The complaint upon which the order of the Board is based alleged that the Company "discharged and refused to reinstate the following named employees **because they were members of the United and because they were not members of the Independent**" (R. 35). There is no evidence to support this charge.

The findings of the Board are worded in the same way (R. 24): "We further find that by discharging the forty-three named employees named in Appendix A because of their membership in and activities on behalf of the union and because they did not belong to the Independent, the respondent discriminated with respect to their hire and tenure of employment. * * *" There is no evidence to support this finding.

The court apparently hesitates to make such a finding simply stating that "pursuant to the contract, it discharged forty-three of the former employees who had taken part in the effort to organize the CIO union because they had not become members of the Independent, although it knew that thirty-one of these employees had applied for membership in the Independent and had been rejected" (R. 347). The latter statement is without foundation.

It is true, as the court states, that the forty-three employees were discharged because they had not become members of the Independent. It is not true as the court finds that the Company knew that thirty-one of the employees had applied for membership in the Independent.

The suggestion of the Company that the employees be accepted as members when it found out this fact is certainly no evidence that the Company wanted to discriminate, but quite the contrary. The attitude of the Company and what happened is fairly well set forth in Respondent's Exhibit 9 (R. 289, Tr. 574). The President of the Company wrote to Thompson that he was "very concerned" over the report. He appealed to the union to take back any of the employees who desired to become members of the union. He deplored the differences of opinion which prevented the people from working together.

The Company's attorney then attended a conference in Cincinnati with the Regional Director to try to induce the Independent to take the men back. Mr. Thompson testified that Mr. Wallace seemed sincerely anxious to see that these employees returned to work (R. 111). He was asked this question:

> "Q. Is it not true that your union—when I say your union, I mean the Independent union—has considered and presented to it various proposals to take these people into the union, those 30 or 40 people that were excluded? A. Yes.
>
> Q. And they have consistently refused to take them back? A. They have."

At the hearing itself counsel for the Company suggested a recess so that the Independent and the Board could get together to try and settle the problem, "the principal problem here of the return of these people to work." In that proposal counsel for the Company said in open court: "I suggest, in the interest of possibly disposing of this matter and with the assurance which I made before and now repeat, that the Company is ready to take any steps which are necessary to the end that these people be put to work, as it has been throughout since this agreement was entered into" (R. 68).

There is only one brief piece of evidence in the record that the excluded members were in fact members of the CIO (R. 152, where Dodrill stated he checked the cards after the lay-off). There is no evidence whatever that the Company itself desired to discriminate against CIO members, in fact the evidence is to the contrary. One of the witnesses for the Board and the CIO stated that the foreman White had tried to get him to join the Independent. "He said he hated to see me quit, or something like that" (R. 152). This witness did not even apply for membership in the Independent. During the strike White had called upon witness Green, a member of the CIO, and she attested to his fairness about the union matter as follows:

> "Q. Do you remember what Harry said, what he talked about? A. Well, Harry said he was getting tired of loafing and Minnie and I said we were too, but there was nothing we could do about it, we did not suppose, and Harry said: 'Well,' he said, 'I don't give a damn what union they belong to,' he said, 'I would like to see them get this thing settled and all of us get back to work'" (R. 193).

A number of CIO members were taken back by the Company without any question merely because they were members of the Independent. The witness Orville Smith was a CIO member and he testified that he was taken into the Independent along with seven others after the strike (R. 123).

The sole reason for the discharge by the Company, as appears from all the evidence, is the fact that the employees in question were not members of the Independent.

Petitioner's witnesses were entirely frank on this point: The Company and its officers always understood that a closed shop clause gave control of its own membership to a union and that if the union excluded employees of the Company they became ineligible to work at the plant.

On cross-examination by Mr. Ritchie, the Trial Examiner asked about this point (R. 266). He said to Mr. Ritchie:

> "Mr. Ritchie, the point I have in mind, and I will ask the question now, whether or not the Company considered that by the signing of the contract between the Company and the Independent, that the Independent was obligated to receive as members employees within the unit described; I want to know whether that was the Company's understanding of the contract or whether it was not?"

After some further colloquy of counsel, the witness (Christmas) said:

> "It was my understanding of this agreement that after the ten-day waiting period everyone working in the jobs specified here as being eligible to union membership would have to be members of the union."

Trial Examiner Spencer then asked some other questions which appeared to confuse the witness, and Mr. Ritchie took the witness (R. 267):

> "Q. I understood you to say, Mr. Christmas, that one of the objections that you had to the union shop provision was that it would give the organization the power to keep out men who were employees and who you might want to rehire? A. That is correct; yes, sir.
>
> Q. Well, in reaching that conclusion, was it your position or thought that the matter of taking in members was a matter solely in the hands of the union? A. That is correct; that is what I understood the contract to mean.
>
> Q. And that the union had the right to stop or exclude any persons whom they desired, had the right to accept or exclude any persons whom they desired to accept or exclude? A. That is what I understood."

It is equally clear from the testimony that the Company had no notion of the extent to which the Independent would go in excluding employees. As above stated, a notice of the contract, quoting its provisions, was posted. At several points in the examination, the president of the Company and Mr. Christmas, vice president, were asked what they knew about the intentions of the union to exclude employees. Mr. Christmas said that when they were negotiating the contract that they did not then learn from the Independent any specific employees that they had in mind to exclude. During the ten-day period between the date of the contract and the date of the layoff, Mr. Christmas conferred with the union representative at White Sulphur Springs with the purpose, in part, of talking about the closed shop clause. He says at that time he had no information as to how many employees might fail of election to the Independent (R. 256).

When Mr. Wallace was asked about the lay-off, he said (R. 278):

> "The first I knew of it, Mr. Phillips called me up in Cincinnati. That was my first knowledge of any man's layoff.
>
> Q. What did you say there? A. I told him I didn't believe it.
>
> Q. Did you confirm it? A. I did, and found it was true, and called him back and told him so.
>
> Q. And what effort did you then make in regard to them? A. Well, I asked you to go to Cincinnati and talk to Mr. Phillips about it. I called Mr. Thompson on long-distance phone, possibly wrote him a letter, asking him to reconsider.
>
> Q. Do you know whether that was after you received notice of a complaint having been lodged with the Labor Board or after? A. That was before."

Again (R. 281), Mr. Wallace was asked about it again:

> "Q. Was it your understanding at the time this contract was entered into that all the employees, if

they asked for membership in the union, would be given that permission? A. Frankly, sir, I never thought of it; it never occurred to me. I certainly did not expect them to refuse forty-two people.

Q. Well, did you expect them to refuse anybody? A. No; I did not. I thought once the election was held, and the union certified to, that our troubles were over, and it never entered my mind."

The Board's agents themselves considered that Thompson was responsible for the discrimination in this case. Thompson was called to the witness stand by the Board apparently under the erroneous impression that they did not thereby make him their own witness. Thompson relates at length the extraordinary efforts of agent McKay, by pressure on his employer, Woodyard, to get Thompson to use his influence to obtain membership for the excluded employees. Thompson quotes McKay as saying:

> "He then told Mr. Woodyard that unless you cause to be admitted into membership in the Richwood Clothespin and Dishworkers Union a certain group of former employees of the Wallace Corporation who had applied for membership in said union and been denied the same, that the Labor Board would file charges of company domination and unfair labor practices" (R. 106-7).

Woodyard was Thompson's employer and owner of the "Nicholas Republican." McKay, the agent for the Board, actually tried to get Woodyard to discharge or transfer Thompson from his job as editor (R. 108).

The charge in question was clearly a charge against Woodyard Publications, because McKay contended that Woodyard was an employer (R. 106). This question was asked of Thompson (R. 108):

> "Q. Do you mean to say that as a condition of withholding of this charge that he asked Mr. Woodyard

to discharge you from your job? A. Either to discharge or transfer me to some other location.

Q. That was in your presence? A. It was."

In point of fact Thompson was, pursuant to this theory, named as a respondent-employer in the Board's complaint (R. 1). The Trial Examiner granted a motion to dismiss as to the respondent Thompson (R. 4).

The petitioner submits that these desperate efforts of the Board's agent to influence Thompson constitute an admission by conduct that the Board knew that Thompson was the party responsible for the exclusion, and not the Company.

The petitioner submits that it is more than obvious from the record that the Company reluctantly dismissed these employees for the sole reason that they were not members of the Independent and therefore not eligible for employment under the closed shop contract. It is furthermore than obvious that the Company did not select the persons who were excluded. The Company admitted former CIO members who were admitted into the Union. The discrimination was the Independent's act and the only reason given by the Independent for the exclusion was the above-mentioned letter stating that the Independent intended to exclude employees who were hostile to the Independent.

The failure of the Board and the Court to distinguish between the employees who applied to the Independent for membership and the twelve employees who did not apply for membership shows again the unfairness of the Board's finding that the Company was party to the illegal discrimination. It cannot reasonably be held that even the Union itself excluded employees from membership who had never applied. The Company cannot be charged as party to an act which never took place. The twelve employees in question by their own act failed to qualify for

employment as members of the Independent. All of the authorities cited below agree that under a closed shop contract a union may require the discharge of employees who fail by their own act to join the union having the closed shop contract.

The whole finding of discrimination on the part of the Company is unsupported by the evidence. Discrimination involves a knowledge of the difference upon which the selection is based. The Company never had any knowledge upon which to select some CIO members for re-employment and others for disqualification. This discrimination was the act of the union. There is every reason to suppose that the union's discrimination was based, as it stated, upon the hostility of the excluded employees when they were excluded, and, as above stated, as to the twelve there is no evidence of discriminatory act on the part of anyone.

The situation which confronted the Board was clear. The Independent union had harshly caused the discharge of certain CIO members. Whether the act of the Independent was illegal or malicious or unreasonable, the law gave the Board no authority to proceed against the union or to penalize the union for its action. The Board therefore sought to charge the Company with the Union's act and to impute to the Company the motivation of the union. That the Board's agents were desperately looking for some remedy is amply demonstrated by the circumstance that they joined Thompson in the complaint. It is also a circumstance to support this theory that in its complaint it charged the Company with "defining qualifications for membership in the Independent so as to defeat the United". (R. 35). This charge also failed as, in fact, all the efforts of the Board to prove discrimination on the part of the Company likewise failed.

The Board was without authority to remedy this situation because the law gave them no such authority and, as

pointed out below, it is even doubtful whether the excluded employees had any remedy against the union under the existing state of the law. So they "find," a non-existent discrimination by the employer.

The facts show that the employees in question were laid off simply upon failure to produce evidence that they were members of the union, that the Company did not desire to do this and did everything it could to induce the union to reinstate them. There is no evidence that it knew either the reasons for exclusion; or whether they had been excluded or simply failed to apply for membership. The facts in this matter in the record are shown by a stipulation requested by the Board's counsel and inserted in the record at the trial of the case which stated the entire facts, **not as known to the Company at the time of the lay off** but as subsequently determined by the parties (R. 99). It was stipulated at the hearing that thirty one "applied for membership in said Richwood Clothespin and Dishworkers Union and their applications were voted upon by the members of said organization in the regular manner as provided by the constitution and by-laws of said organization, but said applications did not receive the required number of votes to permit them to become members therein." It was also stipulated that twelve of the forty-three employees "did not apply for membership in the said Richwood Clothespin and Dishworkers Union."

The Board and the Court fail wholly to make any distinction in this case between the employees who were thus excluded by the union and those who failed to apply for membership, thus charging the Company with discrimination which was not even practiced by the union, and charging it with knowledge which it never had and which was essential to the discrimination with which it is charged.

III.

Far From Being an Unfair Practice, the Decision of the Employer to Abide by Its Contract Was Correct in This Case for the Following Reasons:

(a) The employer in making the closed shop contract in this case did no more than it was obligated to do, and the contrary holding of the Court is in error.

The settlement agreement contained this provision (R. 55):

> "The company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a union shop, provided that the company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause."

(Parenthetically, no point has been made in this case that this agreement of the Company for a union shop is to be distinguished from an agreement for a closed shop. Mr. Wallace, President of the Company, used the term "union shop" to mean a shop where he could hire whom he pleased provided that they became members of the union, and "closed shop" to mean a clause where he had to go to the union for all employees (R. 276). The terms "union shop" and "closed shop" are interchangeable as recognized by the authorities. Jerome Toner in his book, "The Closed Shop" (Washington, D. C., 1942), page 27, says:

> "Today the union shop and the closed shop mean substantially the same thing."

In his notes to his section on the Closed Shop in "Cases on Labor Law" (St. Paul 1944), at page 67, Milton Handler defines the closed shop and the union shop as follows:

"Closed shop—only union members can be hired and workers must remain union members to retain employment.

"Union shop—Non-members may be hired but to retain employment must become union members after a certain period."

There is no doubt then that the contract made by the petitioner was within the terms of the National Labor Relations Act.)

Section 8 (3) of the National Labor Relations Act (29 U. S. C., Sec. 158) reads as follows:

"Sec. 158. Unfair labor practices by employer defined

"It shall be an unfair labor practice for an employer—

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a), of this title, in the appropriate collective bargaining unit covered by such agreement when made."

The contract which the employer actually made (R. pp. 61-66) provided:

"(E) The company agrees that all of its employees, other than office personnel, superintendents, managers, foremen, watchmen and any others assigned to supervisory duties, shall be members of the union in good standing. With respect to present employees of

> the company not now members of the union and likewise with respect to any person hereafter hired by the company, other than those above expressly excepted, all such persons shall become members of the union within ten days from the date of this agreement, as to present employees, or within ten days from the date of employment with respect to future employees, and the company, upon request of a duly authorized officer of the union designated for the purpose, shall require identification of any employee as a member of the union and proof of good standing.

The evidence is ample and uncontradicted that the company sought to avoid the latter clause in negotiating the contract of March 7th. Mr. Thompson testified that the Wallace Corporation opposed the closed shop clause in the negotiation of this contract. He said (R. p. 100):

> "Mr. Wallace very vigorously opposed it."

Mr. Christmas stated that one of the reasons why the first draft of the contract with the Independent was rejected was because it contained the closed shop clause (R. p. 263).

The court below states that counsel for the company "strongly advised against the closed shop contract," perhaps inferring that the company entered into the contract contrary to advice of counsel and on his opinion that it was illegal. Such is far from the case. Both the Company and counsel recognized the difficulties which would ensue from enforcement of the contract in the face of a rival union.

As a matter of fact the record shows that the Regional Director for the National Labor Relations Board came very close to advising the company to proceed with the closed shop contract. In a letter to the Regional Director of April 13, 1942, counsel for the petitioner reminded the Regional Director of a conversation (R. p. 301):

"You will remember that when I expressed considerable concern about the closed shop clause required by the union in their working contract, you made the remark over the telephone that probably I would have to agree to it as the CIO certainly would have insisted upon it if they had prevailed in the election."

The Real Reason for Compliance.

The fact of the matter is that the company finally complied with the settlement agreement and granted the closed shop contract because it feared otherwise another closing of the plant.

Mr. Davis, superintendent of the plant, was asked whether it was true that if the employees in question were put back to work the company would close the factory down (a question wholly unwarranted from the evidence). He said (R. p. 224):

"It was my honest opinion that if these 40 employees were ordered to be put back, the 240 that were working would be out of work. Yes, sir.

Q. Why? A. Why?

Q. Yes. A. Because they wouldn't work together.

Q. Oh, you mean that they would quit? A. Yes, sir.

Q. The rest of them would all quit if the 44 would be put back, that is what you mean? A. Yes, sir."

The only contention of the Board is that the company should not have made the contract, knowing of the hostilities between the two unions and the intention of the Independent to exclude unspecified employees from the union because of hostility and in order to preserve their majority. This hostility was no doubt the outcome of the bitter strike and may well have been based upon knowledge by the union of hostile acts or declarations of intention to undermine the union. The record does not show any details.

The quoted portion of the contract is an obligation of **the company** that all employees shall be union members. The court suggests that the company "should have seen that provisions were inserted that protected their rights." The union made no agreement whatever to admit all employees. The union had rights to a closed shop but surrendered no rights of control over membership. If an employee were not a member, the union could raise the issue and the employer was bound to discharge him.

This clause was not desired by the Company; it was insisted upon by the union. Both the company and the union understood that it gave the union control of membership with the right to exclude. Mr. Christmas so testified (R. p. 264). The union insisted upon it.

In the absence of any evidence of discrimination, it is clear that the reason for the discharge of these employees was the requirement of the contract and none other. As shown below, the law authorizes such a contract.

(b) **The employer was supported by two well settled principles of law, namely, that a union has exclusive control of admission to its own membership, and, second, that the National Labor Relations Act enjoins upon an employer absolute non-interference with respect to membership or non-membership in a union.**

Failure to comply with a closed shop contract with a certified union is an unfair practice.

It is not necessary to discuss the authorities holding that the courts themselves never interfere to dictate or supervise the admission policies of unions either at the behest of the excluded employee or the employer. The leading case is **Mayer et al. v. Journeymen Stone Cutters Assn.** (1890), 47 N. J. Eq. 519, 20 Atl. 492. This was a case of exclusion of "harvesters," that is, foreign immigrant labor. See also **Miller v. Ruehl**, infra; **Greenwood v. Building Trades Council of Sacramento** (App. Dist. Cal.

1925), 71 Cal. Appl. 159; **Shinsky v. Tracey**, infra; **Maguire v. Buckley**, 301 Mass. 355, 17 N. E. (2d) 170; **Murphy v. Higgins** (N. Y. Supreme Ct. 1939), 12 N. Y. S. (2d) 913, and other cases cited below.

Moreover, the National Labor Relations Act itself forbids an employer "to encourage or discourage membership in any labor organization" [Section 8 (3)]. This injunction upon the employer is contained as the major rule of conduct in the very section of the Act which permits closed shop contracts. The Act permits merely the "making" of agreements for a closed shop but does not otherwise limit the injunction upon the employer of non-interference with the rights granted by the Act. He is forbidden alike to encourage or discourage membership in any labor organization.

Failure to comply with a closed shop contract with a certified union is an "unfair practice."

It is notable in this connection that it has been many times held by the Board and similar boards that refusal of an employer to observe a closed shop contract which it has made is an unfair labor practice. For example, see **Carroll's Transfer Co.**, 14 Labor Relations Reports, Supplement of June 19, 1944, 56 NLRB, #168. See also **Shawsheen Dairy, Inc.** (1938), Mass. Labor Relations Comm. Case U. P. 241; **Modern Cleaners Co.** (1940), Wisc. E. R. B. Decision 129-A.

The rule has been applied in jurisdictional disputes. It is suggested by the Eighth Circuit Court of Appeals in **NLRB v. Gluek Brewing Co. et al.** (CCA 8th No. 12624, dated Aug. 7, 1944, reported in CCH Labor Law Service, Sec. 62314) that far from being obligated to protect minorities in a closed shop situation, the employer is obligated to support the closed shop union. In this case the brewing company had, as the court stated, been the "unwilling and unhappy battleground" of a jurisdictional dispute between the brewers and the teamsters. Under

pressure from the teamsters, it discontinued deliveries and made an independent contract with Bach Transfer & Storage Co. to handle its deliveries, the latter company using union teamsters for drivers. The Board found and the court confirmed that the action was an unfair labor practice in the face of the brewing company's closed shop contract with the Brewers Union. The court announced the doctrine with citation of many cases that the intent of the employer was not within the ambit of the power of the court to review, and said:

> "The fact situations in South Atlantic Steamship Co. v. NLRB (5th Cir.), 116 Fed. (2d) 480, and NLRB v. Star Publishing Co. (9th Cir.), 97 Fed. (2d) 465, are in important respects similar to this case. It may be said, also, that Gluek would have been justified, if not indeed obligated, to oppose Teamsters and to support Brewers because it had an unimpeachable closed shop contract with the latter. Act, Sec. 8 (3), Title 7, USCA 158 (3); International Assn. of Machinists v. NLRB, 311 U. S. 72, 81; Warehousemen's Union v. NLRB, 121 Fed. (2d) 84, 87; M & M Woodworking Co. v. NLRB (9th Cir.), 101 Fed. (2d) 938, 940."

See also M. & M. Woodworking Co. v. NLRB (CCA 9th, 1939), 101 Fed. (2d) 938.

IV.

On Existing Authorities Quaere Whether the Court Should Hold That It Is Unreasonable or Unlawful for a Union to Exclude From Its Membership Members of a Rival Union or Employees Otherwise Hostile.

The principal notice which the company had of the intention of the union to exclude is contained in a letter from Mr. Thompson on the letterhead of the "Nichols Republican," dated February 28, 1942, insisting upon the closed shop clause (R. p. 287). He had evidently dis-

cussed the matter with his counsel, Mr. Ritchie. The reason for the Independent's insistence upon the closed shop is stated clearly:

> "Therefore, if you continue to hire new employees who are favorable to the interests of our opponents, they will be in the majority before long and affiliation with our opponents would probably be their next step."

He refers, in addition to counsel Ritchie, to some "Research Institute Analysis" about the law:

> "* * * the closed shop will therefore give us some control in the hiring of additional employees who are unfavorable to our interests and who would further jeopordize (sic) our majority."

He also refers to present employees, including Harvey Dodrill (who is the only person named in the letter), "whom our members have declared by unanamous (sic) ballot that they will not work with, whose presence in the plant is unfavorable to our interests." At the end of the letter he says:

> "We must insist, however, upon a closed shop and we would generally appreciate it until it can be effected, if you will avoid taking on any additional employees whose sympathies are favorable to the interests of our opponents."

There was nothing in this letter to indicate any wholesale exclusion. In fact, Thompson specifically states the hope that the company "will not become convinced that our intentions are to become radically unreasonable."

There is no doubt whatever from this letter that the union was trying to protect its majority and protect its union.

It is notable that the union did not exclude all sympathizers with the CIO. There is no evidence of how many members they had, except the report of the election in

which 87 votes were cast for the CIO against 98 for the Independent (R. p. 60). It appears obvious that many members of the CIO were taken into the Independent. There is specific evidence in the record that many former CIO members were taken into the Independent. Orville Smith testified that he was a former CIO member and that seven others were taken in with him after the strike and continued in employment (R. p. 125). The witness Green was a member of the CIO (R. p. 122), and was continued in employment. This subject is discussed more in detail under Point II above, demonstrating that there was no evidence of company discrimination. The company had no knowledge on which to base any discrimination.

It is notable, also, that the company, after the strike settlement agreement, re-employed all employees regardless of membership.

Was the position of the Independent union under these circumstances unreasonable to such an extent, or so clearly illegal, that the employer should have refused to make the closed shop contract?

There are not many clear cases on this question. Employees do not often litigate for the sake of getting a job. However, the weight of authority indicates that a union may legally exclude from membership persons whom it believes hostile to the union. The employer should not have to decide such a question. Prima facie he was amply warranted in keeping his hands off. In view of the charges in this case, however, it is of importance to show that the authorities hold that the union is absolute in this field and may exclude for reasons of hostility.

While, as pointed out above, it is the almost universal rule of the courts that they will not interfere to require a union to admit nonmembers, regardless of the reason for exclusion, it is perhaps worthy of note that a number of cases have come to the courts where members sought

admission and had been excluded for the sole or controlling reason that they had been hostile to the defendant union.

Acierno v. North Shore Bus Co., Inc., and **Amalgamated Assn. of Street Ry. etc. Employees** (Sup. Ct. of Kings County 1939), 17 N. Y. Sup. (2nd) 170, 173 Misc. 79: The plaintiff sued for injunctive relief to be admitted to the American Federation of Labor union, which had a closed shop contract with the North Shore Bus Co. The plaintiffs had formerly been employed by the Bee Line, Inc., which formerly operated the bus line, but it had labor trouble and it was alleged the plaintiffs had been strike breakers in this labor trouble. The Bee Line franchise was taken over by the defendant bus company and the new bus company had agreed with the City in taking the new franchise that it would hire employees of the company which formerly operated the route. The plaintiffs were refused membership on the principal ground that they had been strike breakers. The defendants asserted: "It would not be consistent with the efficient operation of the busses of the company to hire these strike breakers," and the court said:

> "Under the present state of the Law, the court cannot compel a union to accept anyone for membership, irrespective of the cause for refusal and even though such refusal may be arbitrary." Citing Miller v. Ruehl, cited below.

In **Shein v. Rose** (Supreme Court, New York County, 1939), 12 N. Y. S. (2d) 87, an excluded member who had a work permit sought by injunction to be admitted to the Millinery Workers Union No. 24 in New York City. It appeared that the plaintiff had been a member of a sister local in Chicago, had been awarded a scholarship to the Brookwood Labor College at Katona by this local and upon return to Chicago had joined the Needle Trade

Workers Industrial Union. "This latter organization was maintaining open warfare in direct competition with the local which sent her to college." The plaintiff had been excluded from membership. There was some contention that the Industrial Union was communistic or controlled from Russia, but the court said:

> "More significantly is the undisputed fact that this organization was engaged in direct activities which, if successful would strike down and eliminate the defendant local and remove it from existence in the labor field here."

The court held that the union was justified in a cautious policy, that the antagonistic attitude of the plaintiff was apparent, and relied upon the general principle that the membership was a privilege and not a right. The defendant could have refused membership, limited or unlimited, and such refusal could not have been reviewed by the courts.

One of the leading cases on this point is **Shinsky v. O'Neil** (1918), 232 Mass. 99, 121 N. E. 790, which should be read in connection with a preceding case by the same plaintiff, entitled **Shinsky v. Tracey** (1917), 226 Mass. 21, 114 N. E. 957. The case should also be compared with Fairbanks v. McDonald (1914), 219 Mass. 291, 106 N. E. 1000, digested infra, which holds that even if a union exclusion is wrongful, the employer should not be held liable. In the earlier case the plaintiff, a shoe worker who had been a member of the United Shoe Workers Union, but **had been expelled** for joining a rival organization, sought damages and an injunction against officers of the union when he was discharged by an employer under a contract between the union and the employer, called a "peace pact," which required the employer to employ union members only, so long as the union was able to furnish workers. The closed shop contract was urged in defense

in this case, but was disregarded as a defense because the Master and the lower court had found that the dominant purpose of the union was "to punish him and hold him up as an example before their membership." The court held that "the defendants were not seeking the protection of the contract for the economic purpose of furnishing work for their own members," but that the action was "malevolent." The case therefore turns upon the finding of malice by the court below. The court awarded damages, but denied an injunction for the reason that it considered such relief would be ineffective.

Subsequently the same employee filed another suit, **Shinsky v. O'Neil**, supra. He had applied for work at two different places and had been refused work, and at the third had been employed but discharged upon representations of the union. Two of the employers in this case were subscribers to the same "peace pact" mentioned in the first case and the third had a plain closed shop agreement.

In this case the closed shop agreement was definitely in issue as a defense. The court below had found, and no objection was made to this finding, that the exclusion by the union was pursuant to its general policy "to secure all work possible for their members rather than to have it go to unaffiliated workers," and also to "secure an increase in number of what are sometimes called closed shops," one of the purposes of this policy being to "enlarge and strengthen the union organization." The contention was that this purpose took the case out of the general decisions sustaining closed shop contracts, but the court said it was not able to accede to this contention of the plaintiff and continued:

> "Workmen cannot hope to succeed in securing advantages of bargaining for the common benefit unless their combination, their organization, their union (call it what you please) is a large and strong one. If any member of the combination or union were to

testify that he did not wish, 'to enlarge and strengthen the union organization,' no one would believe him. No one would believe that a member of a labor union organized to secure the advantages of bargaining for the common benefit could hope to succeed unless all the members of the union did their best 'to enlarge and strengthen the union organization.' So far as this finding of the Master is concerned, we are of the opinion that the policy of the United Shoe Workers of America 'to enlarge and strengthen the union organization' is an incident and a necessary incident to a successful combination to secure the advantages of bargaining for the union benefit. What we have said with respect to this finding of the Master is also true of the other findings relied on by the plaintiff, namely, 'a part of the policy of the union is to secure an increase in number, what are sometimes called closed shops.'"

It is of interest to note in this case two circumstances: (1) that the plaintiff in Shinsky v. Tracey had sought an order of the court requiring the union to admit him after his expulsion, and the court held, on familiar principles, that he had no remedy in court for such reinstatement. (2) It is also interesting to note that the Master in Shinsky v. O'Neill had found as follows:

"The last finding of the Master which is relied on by the plaintiff to take this case out of Hoban v. Dempsey, and the doctrine of Pickett v. Walsh, is this: 'I find that, as a consequence of the case, Shinsky v. Tracey, 226 Mass. 21, and the proceedings leading up to that suit, the defendants, other than Daly and Hedlund (employer's representatives) and the union generally were and are in a state of hostility to the plaintiff.' It is plain from the Master's finding which follows immediately after this finding that he did not intend by this finding to state that the refusal to employ the plaintiff was based on 'hostility to plaintiff.' Immediately after this finding the Master

made the following finding: 'But I do not find that, in the three incidents related in this report, the defendants or the union did anything adverse to the plaintiff that they would not have done had the plaintiff been a non-member of the union against whom no such hostility existed.' Whether the plaintiff could have obtained admission into the union as an ordinary member could, must be a matter of conjecture because he made no application for admission."

No exceptions were taken to Master's report.

The last statement of the Master is difficult to understand in view of the fact which was in the record of this case and was stated by the court as a fact in the beginning of the opinion that the plaintiff had been actually expelled from the union and had sought in the court below a decree of court ordering the union to readmit him. The distinction which the court is evidently trying to make is that the hostility which existed was a hostility due to the status of the plaintiff rather than to any personal considerations or personal ill will.

The court in Shinsky v. O'Neill denied the application for an injunction. The court pointed out that the defendants had done nothing more than to insist upon the enforcement of agreements.

There was an interesting contention by the plaintiff in Shinsky v. O'Neill that it was not the custom of the union to refuse membership to workmen wishing to join the union, and he advanced this policy as a further indication of illegal purpose or of malice and ill will against him—that in the policy of the union "It is not the work, but the man and the closed shop which the union really seeks in order to enlarge and strengthen the union organization." The court then remarks that the union would "open itself to serious criticism if it refused to admit to membership men qualified to perform the work

done by members of the union in question. By having as a part of its policy the custom of not refusing membership to workmen who wish to join such a union avoids subjecting itself to this criticism. We are of opinion that the finding of a Master here relied upon cannot be taken to mean anything more than this."

This dictum is sometimes quoted as indicating that exclusion of the kind indicated would be illegal. The question, however, was one of motive. The case is one where the plaintiff had been expelled from the union, which is stronger than the case of an employee non-member desiring to enter for the first time.

One of the leading cases in New York frequently cited is **Miller v. Ruehl** (Supreme Ct. Erie County 1938), 166 Misc. 479, 2 N. Y. S. (2d) 394. The case again turns on the general rule that the courts will not interfere in the membership of voluntary associations. The dicta in the case are, however, worthy of quotation, because the court realized the hardship involved in the exclusionary policy and in its holding that the union has the right to exclude from membership anyone it desires, regardless of reason. The following quotation from the case is worthy of repetition in showing that the court recognized the danger of compelling a union to accept members where such persons might be inimical to the union or destroy the union if admitted. It is also notable that the court in this case says that it is for the legislature to remedy the situation, and not for the court. The court held as a matter of law that the union has a right to reject from membership anyone it desires.

> "Legislation has led to efforts of large aggregations of labor unions to secure control of employment in certain industries, and there have been tremendous campaigns conducted for the inclusion of persons in one set of unions or another. So to the ordinary man it may appear somewhat odd that a person who ap-

parently is qualified under the rules of union to become a member is rejected by the union solely on the ground that the union does not care to have him as a member.' No provision of statute has been enacted to require a union to take into its membership any person who petitions for membership if such union does not desire that person as a member. But the petitioner contends that the legislation recently enacted must necessarily carry with it as a corollary rule of law the right of a laboring man to be admitted to membership in a union of his choosing."

"Before these recent efforts to unionize industry had governmental sanction in the manner in which sanction is expressed today, there had been efforts made on the part of individuals to force themselves into membership of unions and the courts have held in such cases that a union could not be compelled to accept an application for membership unless the union so desired. The basis of such holding has been that, if the union which was a voluntary association organized for the good of those in industry who would be eligible to membership could be compelled to accept members, the persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and from within destroy the union and thus stultify the purpose for which the union was organized. Simmons v. Berry, 240 App. Div. 90, 205 N. Y. S. 442; Id., 211 App. Div. 704, 208 N. Y. S. 204, reversed 240 N. Y. 463, 148 N. E. 636; Greenwood v. Building Trades Council of Sacramento et al., 71 Cal. App. 159, 233 Pac. 823; Harris v. Thomas, Tex. Civ. App., 217 S. W. 1068; Mayer et al. v. Journeymen Stone Cutters Assn. et al., 47 N. J. Eq. 519, 20 Atl. 492."

"As the legislature has not enacted a specific statute compelling unions to accept members, this court is of the opinion that a labor union which is a voluntary association still has the right to reject applicants for membership at will. In view of this holding, one might ask what is to become of the applicant if he is

true in his statement of fact that he will be unable to obtain employment at his chosen vocation because he is not a member of the union. This is a question involving public policy and must be answered by the legislature. In enacting legislation to strengthen the cause of labor through unions the legislature has not made provision to compel unions to accept members. Its failure to do so must be accepted as the present expression of public policy and, therefore, an endorsement of the view expressed in the cases above cited that an applicant for membership cannot force his way into the union against the negative vote of the union."

New Jersey cases. New Jersey has furnished a number of precedents, notably the leading case of Mayer v. Journeymen Stonecutters, supra, holding that the courts will not undertake to require a union to admit members, such admission not being a right in any case, and also **Cameron v. International Alliance of Theatrical Stage Employees** (1935), 118 N. J. Eq. 11, where a union having a practical monopoly was enjoined from enforcing against its "junior" members an unfair and discriminatory by-law. The case is not inconsistent with the rule on exclusion of non-members, but is one of those cases where the by-law in the presence of monopoly was held in restraint of trade as against existing members.

The later case of **Wilson v. Newspaper & Mail Deliverers Union** (1938), 123 N. J. Eq. 347, 197 Atl. 720, was a closed shop case where the plaintiff was excluded by the union because "the books of the union were closed to new membership by reason of the fact that many members of the union were unemployed." The court found a monopoly and enjoined the union from interfering with plaintiff's employment. The Chancellor said:

"Everyone must be left free to pursue his lawful calling; that is fundamental. It seems to me neces-

sarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade of magazine mailers.

"A union may restrict its membership at pleasure; it may under certain conditions lawfully contract with employers that all work shall be given to its members. But it cannot do both."

The case falls short of holding that a closed shop with a closed union is invalid because of the element of monopoly, which was formerly held in New Jersey to invalidate a closed shop contract. The doctrine has been abandoned in most jurisdictions, as shown below under Point V (6). More particularly, the doctrine has been abandoned in New Jersey in the case of **East v. United Oystermen's Union** (1941), 130 N. J. Eq. 292, 21 Atl. (2) 799, discussed infra. Unfortunately, the latter case does not refer to the Wilson case.

A recent case not contested on the point here involved, also indicates an assumption that New Jersey courts hold that a closed shop contract is valid and permits exclusion of hostile employees from the union.

We refer to the holding of the Chancellor mentioned in **Hudson Bus Transp. Drivers v. Hill Bus Co.** (1937), 121 N. J. Eq. 582, 191 Atl. 763. It appears from the report of this case, which turns on a procedural point, that the bus drivers association sued for specific performance of a contract requiring the defendant company to employ only members of the complainant in the operation of its busses. Pursuant to the contract, the complainant association furnished drivers, but later some of the drivers joined another union, whereupon the complainant expelled the drivers and demanded that defendant bus company discharge the expelled drivers. The bus company did discharge them but reinstated them at a later date. The decree was granted and upon appeal no exceptions were

taken. (The expelled drivers sought to intervene and were admitted as parties below and counterclaimed against the association for wrongful expulsion and against the bus company for wrongful discharge. While the Trial Chancellor had held the complainant was entitled to specific performance of the closed shop contract, he had at the same time ruled that intervenors were not entitled to contest the rights of the union, suggesting a separate suit was necessary. The appeal was from this specific ruling.)

The Pennsylvania cases require some comment. In the Superior Court case of **Dorrington v. Manning** (1939), 135 Pa. Superior Ct. 194, 4 Atl. (2d) 886, plaintiffs had sued officers of a union for injunction against interference with their employment. It appeared that the plaintiffs had been members of a rival independent union called the Wyoming Valley Drivers & Trackers Assn., and while refusing at first to join the new union which had secured a closed shop, all applied just within the time limit and were excluded, because, although they received a majority vote for admission, they lacked the three-fourths vote required. (There was a contention in the case that the employer in the new union had agreed that all existing employees should be kept in employment and the trial court had so held, but the Appellate Court places no reliance on this circumstance.) The Appellate Court found, without mentioning the rival union, that the union had excluded the defendants "with no apparent lawful purpose" and that this constituted a malicious and unlawful interference with plaintiffs' employment and injunction and damages were awarded. The case can be classified with Shinsky v. Tracey, supra, on account of this finding of malice.

V (a).

Even If the Exclusion From Membership in the Union Were Unreasonable, the Act in This Case Is the Act of the Union and Not That of the Employer, for There Is No Evidence of Discriminatory Intent on the Part of the Employer.

The discussion of the evidence on this point is covered under Point II above. The petitioner desires to emphasize, whatever the disavowals of the Board may be, that this case centering on the word "discrimination" necessarily involves a diligent examination of motives. The evidence shows beyond question that the Board by confused thinking has imputed to this employer the motives of the union and the attitudes of its leader Thompson. The evidence shows without dispute that the employer opposed the closed shop in the original settlement agreement, that it was reluctant in the face of trouble ahead to comply with its settlement contract and to grant the closed shop; and that it not only deplored the exclusions in this case, but lent every effort to secure the reinstatement of the excluded employees.

It is manifest further that the employer had insufficient information upon which to base any such discrimination as that which is charged. It is manifest also that both the Board and the Court wholly fail to give this question any careful consideration, inasmuch as they held the employer liable for discrimination against employees who never applied for membership in the union.

V (b).

Absent Conspiracy as in This Case, or Any Evidence of Malice, the Cases Hold an Employer Exempt From Liability for the Exclusion of Members by a Union Due to a Factional Conflict or Otherwise, Even When the Exclusion Is Wrongful.

The court below in its opinion says:

> "It would not be fair to the company to say that it conspired with the Independent union to bring about the discharge of troublesome members of the opposite union" (R. p. 350).

In case it should be thought that the court was being over-generous in this concession to the employer, it should be stated that the Board disowned any charge of conspiracy. In its brief before the Circuit Court of Appeals for the Fourth Circuit the Board's counsel says:

> "In refuting at length the alleged charge before the Board that the company conspired with the Independent in a scheme to discharge the 43 employees, the company is again demolishing a straw man. The Board made no such charge or finding" (Brief before U. S. Cir. Ct. of App., pp. 33, 34).

In view of the full consideration which the Massachusetts courts have given to this problem, the case of **Fairbanks v. McDonald** (1914), 219 Mass. 291, 106 N. E. 1001, is worthy of note. In this case one union sued a rival union and the employer's superintendent for an injunction from unlawful interference with employment of members of plaintiff union. The contract with the union provided that no person who for good reasons was objectionable to the local should be employed in the cutting room. The factory was shut down for four days so that members of the one union would have a chance to join the other. Two of the plaintiffs made an effort to join the prevailing local, but

were prevented by reason of the $100 initiation fee demanded. The fee was imposed for the purpose of punishing these men for their persistence in not becoming members of Local 62. One of the plaintiffs never made an effort to join the local. It appeared that the excluded employees would have been employed by the superintendent but for his desire to end the strike.

Injunction was granted against the officials of the union because the court found that the purpose of the union in demanding the closed shop contract was to exclude the plaintiffs from employment, not to strengthen the union or obtain work for the members. The court held that in contemplation of law this was malice.

The significant part of the case is that the bill was dismissed as to the defendant superintendent of the company, although injunction and damages were assessed against the union.

A number of other cases have reached the courts where unreasonable and oppressive exclusions and discriminations are made by unions and in these cases the courts have refused to hold the employer responsible, and properly so. Foremost among unreasonable exclusions are racial exclusions. In **Blakeney et al. v. California Shipbuilding Corp. et al.** (Cal. Superior Ct., Los Angeles County, 1944), reported in 14 Labor Relations Reporter 796, six negro employees on behalf of themselves and 5000 other negro workers brought suit against the Shipbuilding corporations and the International Brotherhood of Boilermakers, etc. The company had a closed shop. The plaintiffs were in an auxiliary formed solely on the basis of color. The negro members were given employment only after all other members of the Local were employed. The plaintiffs asked for an injunction restraining the Brotherhood and, what is more important here, restraining the employers from discharging or refusing to employ the plaintiffs for lack of clearance or standing in the auxiliary.

The International Union was not before the court. The four corporate employers demurred. The court refused to rule on the case as to the International but sustained the demurrers of the employers, **without leave to amend**, for the following reasons: (a) the employers were not alleged to have had any part in the adoption of the by-laws of the Brotherhood; (b) they had no part in the affairs of the unions; (c) they were required by their contract to employ only those persons in good standing and who had a clearance card from the union; (d) there was no allegation of conspiracy; (e) the employers had no choice under the contract; (f) in entering into the contract the employers did nothing illegal.

In this case the court declined to do what the Fourth Circuit Court of Appeals has done in the instant case and said:

> "A decree ordering the employers to hire workers without union clearance would cut the heart out of a valid contract. The court is without authority to write a new contract for the parties governing a lawful subject matter."

The court reiterated the doctrine that membership in a union is not a right and that the court had no power to compel a labor organization to admit members.

The court also called attention to the fact that the remedy was legislative:

> "The legislature, not having adopted a statute requiring labor unions to admit to membership all who may apply, they are still voluntary associations and may reject applicants for membership at will. The fact that one may suffer injury by reason of non-admission to membership affords no ground upon which the court may decree admission."

As to the employers, the court said:

> "The demurrers of California Shipbuilding Corp., Consolidated Steel Corp., Ltd., Western Pump & Steel Co. of California, and Standard Shipbuilding Corp., are sustained without leave to amend, and plaintiff's application for a preliminary injunction against said defendants is denied."

The same view was taken by the Supreme Court of Alabama in **Steele v. L. & N. Rwy. Co.** (1944), 16 Sou. (2d) 416, a case which is now before this court upon certiorari. The court properly said as to the position of the railroad:

> "Considering, therefore, the situation as thus presented to the railroad, the question at once occurs to the practical mind: What step was the railroad to take? The representative of the craft, the Brotherhood, had made a request for modification of the existing contract concerning seniority rights. Was it the duty of the road to combat the representative and enter into an argument as to its resultant effect upon employees who were in the minority? No such duty is found."

In a number of cases where unions have **wrongfully** excluded employees from membership, the employer has nevertheless been held exempt from liability or penalty. In **Loney et al. v. Wilson Storage & Transfer Co. et al.** (C. C. A. Minnehaha County, S. D. 1944), 14 Labor Relations Reporter 745, the union was enjoined from disciplining members who deserted a strike and enjoined the employer from refusing them employment on the ground that the exclusion or discipline was illegal, but the employer was excused from any liability.

> "The plaintiffs are entitled to recover their costs and disbursements from all the defendants other than Wilson Storage & Transfer Co. * * *."

In **Armant v. Cannon Employees Assn.** (Superior Ct. Los Angeles County 1942), 11 Labor Relations Reference Manual 752, an employee had been wrongfully expelled by the union and discharged by the employer. The union by-laws, strangely enough, provided for judicial review of such procedure. The court held the employee was wrongfully expelled but that the plaintiff was entitled to no relief against the employer, and said (p. 757):

> "Under the evidence herein plaintiff is entitled to no relief in this action against the Cannon Manufacturing Corp. or James H. Cannon by reason of his discharge from their joint employment."

Extraordinary situations arise when there is a change of affiliation in unions by employees of an employer having a closed shop contract. One of the leading cases is **M. & M. Woodworking Co. v. N. L. R. B.** (C. C. A. 9th 1939), 101 Fed. (2d) 938. There was a closed shop contract in this case which, incidentally, required the company to discharge a new employee "if such person is found unsuitable for union membership," and the company agreed to release such persons from employment. The closed shop contract was with an A. F. of L. affiliate and when the CIO secured a majority in the plant the A. F. of L. threatened a boycott. After many difficulties the company reopened with only 50 employees, members of the A. F. of L. union, out of several hundred, and refused to employ the CIO members because they were not in good standing in the A. F. of L. The Board held this was an unfair labor practice, but the Circuit Court of Appeals set aside the order. It is notable that in this case even the Board felt that no penalty was in order because the company thought it was bound by its closed shop contract. The court above set aside the order in its entirety because the employer was simply abiding by his contract. The court had this to say:

"While the agreement was in force—from May 3, 1937, to March 1, 1938—the company complied with it. In that way and to that extent only it discriminated in favor of those who were, and against those who were not, members of Local 2531. If thereby it encouraged membership in Local 2531 or discouraged membership in Local 102, such encouragement or discouragement did not constitute an unfair labor practice within the meaning of Section 8 (3) of the Act."

See, also, **N. L. R. B. v. Gluek Brewing Co. et al.** (C. C. A. 8th, August 7, 1944), 8 Labor Cases, Section 62314.

The Board itself, in **Ansley Radio Corp.** and **Local 1221 United Electrical and Radio Workers of America, CIO**, 18 N. L. R. B. 1023, has held that an employer may not be held guilty of unfair labor practice where he discharges employees under a closed shop contract with the A. F. of L. union, who affiliated with a CIO competing union. It happened that these excluded employees constituted a majority of the employees in the contracting union and it was contended that the majority rule took precedence over the closed shop contract. The employees in question had not in fact been expelled from the A. F. of L. union, but the court held that the facts indicated their withdrawal. The case was further complicated by a prior unfair practice by the employer.

The Board held that the prior unfair practice which was found did not invalidate the contract.

"Where an unfair labor practice, constituting assistance to the contracting labor organization is engaged in after the making of a valid closed shop agreement, the act does not require that the contract be voided if such assistance did not materially affect employees in self-organization or collective bargaining beyond the restraint necessarily inherent in the operation of the contract itself."

This holding of the Board would indicate that in the present case the subsequent discharge should not affect the validity of the closed shop contract in any case.

The Board also held that the majority rule of the Act must be disregarded in the face of the closed shop clause and exonerated the employer from responsibility. The comment of the Board on the closed shop clause is worthy of quotation, l. c. 1059:

> "The freedom guaranteed employees under the Act to form, join, and assist labor organizations and to bargain collectively through representatives of their own choosing, without economic or other compulsion by the employer, is qualified by the proviso clause of Section 8 (3). The legislative history of this clause, as well as its language, shows that its purpose was to leave undisturbed by the Act, except in two instances, a form of industrial relationship which had won increasing acceptance by employers and had found widening approval in the law of the several states. The legislative intent and policy were to withhold what rights individual employees otherwise might have had under the Act but for the proviso in order to permit organized labor to seek and enter into this relationship where the employer was willing to do so and local law offered no obstacle.
>
> "Although the employees who withdrew from the Brotherhood were a majority of the employees in the unit and had designated another labor organization as their collective bargaining representative, it cannot be said that by virtue thereof the immunity accorded the respondent by the proviso clause ceased under the Act and, in consequence, the respondent's refusal to reinstate was violative of the statute. If the Congress had intended to limit in this manner a relationship which it sanctioned under the Act and to impose a responsibility upon the employer for failure to recognize the limitation, certainly such limitation would have been express. There is no express limitation in the Act that the proviso is applicable only so long as the contracting union maintains its majority. The

proviso clause declares that 'nothing in this Act' shall preclude an employer from 'making' a closed-shop agreement with a labor organization 'if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.' Although the proviso relates specifically only to the making of the agreement, the necessary implication is that the employer is protected against a charge of discrimination under Section 8 (3) in carrying out the closed-shop agreement as made, at least where, as here, the agreement is for a reasonable period of time."

An analogous Federal case. In **N. L. R. B. v. Lion Shoe Co.** (CCA 1st, 1938), 97 Fed. (2d) 448, a situation is recounted which is closely analogous to the situation in the instant case. The defendant company had had trouble with the United Shoe and Leather Workers Union which was so acute that the company decided to move its plant from Lynn, Mass., to another city unless a new contract could be made. The plant closed down and the move was announced.

Following this a meeting of old employees was held and a second meeting held at the plant of the company on the following day. As in our case, the Chamber of Commerce was interested and sent a representative to speak to the employees at the factory. A representative of the company also spoke. The employees decided to employ counsel and eventually organized a new independent union called the Lynn Shoe Workers Union. Counsel for the company was present at some of the organization meetings.

The company then made a closed shop contract with the new union and was thereupon charged not only with domination of the new union but also with discrimination because the company required membership in the Lynn Shoe Workers Union as a condition of employment. The case does not show how many of the members of the old union

were excluded by the new union, but it is apparent that from the picketing in the case and otherwise that a considerable number were excluded, either because they refused to join or because they were not admitted.

The court refused to find substantial evidence of unfair practice and held flatly that Section 8 (3) of the Act authorized the making of the closed shop contract. The order of the Board was vacated in its entirety, including the penalties imposed.

As shown under Point III (b) above, the employer in this case is not only warranted in enforcing the closed shop contract here, but if he had not done so he would have been guilty, under the authorities, of an unfair labor practice.

VI.

The Court Erred in Holding That the Closed Shop Proviso of the National Labor Relations Act, Section 8 (3), Authorizing Contracts Which Required Membership in a Union as a Condition of Employment, Also Requires a Union Holding Such Contract to Admit All Employees of the Employer to Membership and Is Not Binding on the Employer if He Is Upon Notice That the Union Excludes Any Employee on the Ground of Hostility of Such Employees to the Union.

(1) The legislative history of the Act shows that it was the intention of Congress in Section 8 (3) of the National Labor Relations Act to accept the status quo as to closed shop contracts and without extending the legality thereof under state law to authorize employers and unions to make such contracts with all the accepted features thereof.

The Circuit Court of Appeals has attempted to construe the closed shop proviso in what it calls "the light of the

* For this section of the brief we desire to acknowledge the able assistance of Mr. Ralph E. Kennedy, a student at Washington University Law School, St. Louis.

general purpose of the statute." It is the purpose of the following discussion of the legislative history of the Act to demonstrate that the closed shop proviso was an exception to the general policy of the Act in respect to two of such policies, as follows: (1) The Act adopts "majority rule" and contemplates that ordinarily the majority shall represent the minority. It is not consistent with this policy to permit a closed shop contract which even under the best conditions means that a majority may and frequently does exclude the minority unless they join with the majority and contribute to its support. Exclusion of a minority group can under no conceivable circumstances be considered representation. (2) It is the general policy of the Act, to which only the "making" of the closed shop is an exception, that an employer may not interfere with union activities or discriminate between employees on account of union membership.

It is manifest from the wording of the statute as well as from the legislative history that the closed shop was an exception to the policy of majority rule. It permits an employer, by agreement with a union, to entirely exclude nonmembers of the union from employment.

It will be apparent from the discussion which follows that Senator Wagner, the author of this statute, realized the dilemma in which the legislature was placed by the insistence upon the closed shop. There was a question in the minds of the labor union advocates of the measure as to whether similar provisions of the National Industrial Recovery Act, in prohibiting all employer interference, had not outlawed the closed shop. The proviso of Section 8(a) of the N. I. R. A. was manifestly adopted to remove any doubt about the legality of the closed shop.

The closed shop was not advocated nor embraced by Senator Wagner. He stated frankly that he "held no brief" for the closed shop. He stated he was simply adopting the status quo.

Legislative Reports and Discussion of the Closed Shop Clause.

The fact that Congress recognized that it was making an exception to "majority rule" when it legalized the closed shop, is amply demonstrated by the committee reports. Senate Report 573 of the Committee on Education and Labor, 74th Congress, First Session, page 13 (Serial No. 9879), contained the following:

> "* * * But majority rule, it must be noted, does not imply that an employee can be required to join a union, **except through the traditional method of a closed-shop agreement** made with the assent of the employer. And since **in the absence of such an agreement** the bill specifically prevents discrimination against any one either belonging or not belonging to a union, the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority." (Emphasis ours.)

See also House Report 1147, 74th Congress, First Session, pages 21-22.

Not only did Congress know what it was doing, but apparently from the hearings, the present Chairman of the National Labor Relations Board, Dr. H. A. Millis, also knew exactly what it was doing. In the hearings before the 74th Congress, First Session, Senate Committee on Education and Labor (Senate Report No. 81958, at page 180),* appears the following statement by Dr. Millis:

> "I approve of the proviso contained in (3). In spite of the contentions of many persons that Section 7 (a) of the National Industrial Recovery Act outlawed the union closed shop, I am convinced that this was not the intent of Congress. The object of the proviso is merely to permit, so far as Federal law is concerned,

* This is an unbound publication. Reference symbol Y 4. Ed 8/ N 21

employers and unions by mutual agreement to provide for the employment of union men only where a majority of the employees in the collective bargaining unit are already union members."

Many other witnesses who appeared, and whose testimony appears in the same report (No. S-1958), insisted upon this interpretation. For example, E. G. Poole, Vice President of the Carpenter Steel Co., Reading, Pennsylvania, page 374:

> "The bill provides that the majority may negotiate a closed shop agreement with the employer. If such an agreement were negotiated, all the employees would be forced to join the labor organization of the majority or lose their jobs. In plainer words, it legalizes closed-shop arrangements, under which 49 per cent of the workers could be thrown into the streets unless they joined a labor organization favored by the 51 per cent."

Senator Wagner defended the proviso. In a colloquy with the witness Colley, page 430 of the same hearings, the following appeared:

> "Senator Wagner. What state are you from?
>
> Mr. Colley. Pennsylvania.
>
> Sen. Wagner. In Pennsylvania closed shops are legal, are they not?
>
> Mr. Colley. That is right.
>
> Sen. Wagner. Therefore under the Pennsylvania statute today your management can make an agreement with the majority of your workers now for a closed shop?"

It appeared that Colley was executive chairman of the employee representatives of the Butler, Pennsylvania, Works of the American Rolling Mill Co. and represented the majority of the employees. Senator Wagner said:

"Now, there is not anything there that cannot be done today in your State, because the management must first agree to it. In effect, it is a limitation, and then it must be agreed to by a majority of your workers. Today, in your State, your management could enter into a closed-shop agreement without the consent of the majority of your workers. This is a greater protection than you have today in the law, because now, before the closed-shop agreement can be forced upon you, a majority of the men you represent must agree to it, in addition to the management, which is not the case now in Pennsylvania, because the management can agree with one leader, with you, for a closed shop."

Senator Wagner's attitude on the Act further appears in debates on the floor of Congress. Congressional Record, Vol. 79, Part 7, 74th Congress, first session, May 15, 1935, page 7673 et seq. Senator Wagner engaged in a colloquy with Senator Hastings, who was concerned, as Senator Wagner said, "**with what happens to the minority.**" Hastings cited the closed shop proviso and Senator Wagner said:

"The Senator apparently does not understand that provision. It does no more than to legalize a closed-shop agreement, which is a matter of agreement between employer and employees where it is now sustained by the public opinion of the state.

Mr. Hastings. This language is perfectly clear. Does it not say, in so many words, that if the employer so desires, and the majority of the labor union so desires, they may make an agreement whereby no one may be employed in the establishment unless he belongs to that union, and will not that provision in this bill compel a minority of employees in that particular shop or that particular unit to join that union, whether they wish to or not, and pay all the fees which the union may desire to charge?

Sen. Wagner. The provision will not change the status quo. That is the law today; and wherever it is

the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation. Closed-shop agreements are made all over the country, and they are matters of agreement. The question of compulsion is not involved in them. Closed-shop agreements are very well known in this country, and they are mere matters of agreement."

In answer to the contention of Senator Walsh, who interjected some remarks to the effect that there was no compulsion upon an employer to give his consent, Senator Hastings said:

"What does the Senator mean by saying that the employer must give his consent? If 51 per cent of his employees demand a certain thing, is he not obliged to consent or have a strike on his hands?"

Senator Robert F. Wagner, the author of this Act, knew what the law did. He was almost apologetic when he said he "held no brief" for the closed shop and that he was making the closed shop no more legal than it had ever been, that he was accepting it as it was.

In a formal statement by Senator Wagner before the Senate Committee on Education and Labor, 74th Congress, first session, in the hearings above quoted on Senate Bill 1958, appearing on page 41, Senator Wagner stated as follows:

"Furthermore, the terms of the bill do not compel or even encourage a man to join any union. Nothing could be more false than the charge that a gigantic closed shop would be forced upon industry. The much-discussed closed-shop proviso merely states that nothing in any Federal law shall be held to illegalize the consummation of closed-shop agreements when they are sought by the majority of the employees in a unit to be covered by them when made. This insertion is necessary to prevent repetition of these mis-

taken interpretations which have held that Congress intended to outlaw the closed shop when it enacted section 7 (a) of the Recovery Act.

"**I hold no brief for or against the closed shop.** But there are many who believe that it is a device which at times may be necessary to advance and preserve the living standard of employees. It is legal in New York, in Massachusetts, and in many other States. **Upon this subject, no sufficient reason has been advanced why Congress should change the status quo.**" (Emphasis ours.)

The Senate Committee report on the bill, No. 573, dated May 2, 1935, Serial No. 9879, page 11, referred to above, said:

"Problem of the Closed Shop.—The proviso attached to the third unfair-labor practice deals with the question of the closed shop. Propaganda has been wide-spread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of Section 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees 'to organize and bargain collectively through representatives of their own choosing,' was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7 (a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

"But to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed shop agreements between employers and employees. In other words, the bill does nothing to facilitate

closed-shop agreements or to make them legal in any State where they may be illegal; **it does not interfere with the** *'status quo'* **on this debatable subject** but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted. (Emphasis ours.)

"The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective-bargaining unit covered by such agreements when made.

"Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been established, maintained or assisted by any action defined in the bill as an unfair labor practice. And of course it is clear that no agreement heretofore made could give validity to the practices herein prohibited by Section 8."

The Committee on Labor for the House of Representatives on the same Act, made a report, No. 1147, dated June 10, 1935, Serial No. 9888, page 19:

"The proviso to the third unfair labor practice, dealing with the making of closed-shop agreements, has been widely misrepresented. The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7 (a) upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill, by providing that nothing in the bill or in section 7 (a), or in any other statute of the United States shall illegalize a closed-shop agreement between an employer and

a labor organization, provided such organization has not been established, maintained, or assisted by any action defined in the bill as an unfair labor practice and is the choice of a majority of the employees, as provided in section 9 (a) in the appropriate collective bargaining unit covered by the agreement when made. The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal. And it should be emphasized that no closed shop may be effected unless it is assented to by the employer."

The exact language above quoted is also found in Report 972 of the House Committee on Labor (Serial No. 9887), after considering the National Labor Relations Board bill. This report was dated May 21, 1935, and the above quotation appears on page 17.

The foregoing quotations should be sufficient to indicate, first, that Congress intended to accept the status quo in regard to the law on closed shop agreements, and second, that it considered the closed shop clause an exception to the general majority rule.

There is no reconciling these two inconsistencies. In the first place, the employer, under what the Circuit Court of Appeals for the Fourth Circuit refers to as the "general purpose of the act," may have nothing to say about union membership. But here is a manifest inconsistency, for he may make a contract to require union membership and thereby promote and acquiesce in the exclusion of non-members.

Second, "majority rule" means that the majority speaks for the minority, but the closed shop is inconsistent with such a rule because manifestly the majority cannot and should not represent or speak for a minority that they will not accept as co-workers and whom they insist upon excluding from employment.

Congress enacted this law to promote and protect collective bargaining, and it accepted, along with majority rule, the existing closed shop policy of unionism, with all its inherent defects.

The inconsistency between the closed shop clause and the rule of majority representation was pointed out by many contemporary writers. In his excellent work entitled "Cases and Material on Labor Law," 1944, Milton Handler, page 68, cites some recent discussions, among others the following found at page 62:

> "The closed shop is definitely unfair where a minority does not wish to belong to the union. The closed shop involves an issue which cannot justly be determined by majority rule. It is one thing for a minority to abide by the will of a majority in an organization to which both voluntarily belong. It is quite another thing for the majority of employees to compel a minority to become part of and subject to an organization that may be totally repugnant to that minority. Ernest Weir: Closed Shop, N. Y. Times Magazine, Aug. 2, 1942, page 7."

(2) **The history of labor unions as well as the reported cases show that the closed shop policy of unions has always contemplated exclusion not only of non-unionists but also members of hostile or rival unions.**

Whatever the merits of the controversy over the closed shop, it is nevertheless true that entirely sympathetic and objective students of labor unions have recognized the compulsory or coercive and exclusive character of the closed shop policy.

In a recent book on "Collective Bargaining Systems" (Washington, American Council on Public Affairs, 1942), E. C. Pierson discusses the legality of closed shop agreements. He is entirely clear about the coercive effect on the individual worker of this institutional policy, whether the worker is an old employee or a new employee refused

because of non-membership. He says: "The worker who refuses to join a union and loses his job as a result is being coerced either way."

Toner in his work entitled "The Closed Shop" (Washington, D. C., 1942), speaks of the "spirit of exclusion" that is historically an element of the closed shop policy. He says: page 36:

> "Discharge of non-unionists from positions or occupations covered by the closed shop agreement is an essential part, implied or expressed, of every such agreement and it is a condition to which the employer must consent."

In an article in the Harvard Law Review on the Triboro case, 56 Harv. Law Rev. 584; the author says:

> "But the result of a valid closed shop contract is to require the employer on demand by the controlling union and for its benefit to make use of just the sort of coercion which the law forbids the employer to use for his own benefit. Before the new laws the employer could legally say: 'John, you are fired because you have not joined my Dependent Brotherhood of Employers Employees.' He can no longer say this; but a union with a valid closed shop contract can compel the employer to say: 'John, you are fired because you have not joined Local 111.' By such procedure the union is enabled, after it once represents a majority and obtains a valid closed shop agreement, properly to obtain unanimity, and there is the rub—to keep that unanimity."

We can even go back to the classical work of Sidney and Beatrice Webb, entitled "Industrial Democracy," first published in 1897, to show the compulsory nature of the closed shop and the early and fundamental character of the policy. The authors say at page 213:

> "There is a strange delusion in the journalistic mind that this compulsory Trade Unionism, enforced by

refusal to work with non-unionists, is a modern device, introduced by the New Unionists of 1889. Thus Mr. Lecky states as a fact that the establishment of monopolies and the exclusion, 'often by gross violence and tyranny,' of 'non-unionists from the trades they can influence' is specially marked 'among the New Unionists.' But any student of Trade Union annals knows that the exclusion of non-unionists is, on the contrary, coeval with Trade Unionism itself, and that the practice is far more characteristic of its older forms than of any society formed in the present generation. The trade clubs of handicraftsmen in the eighteenth century would have scouted the idea of allowing any man to work at their trade who was not a member of the club. And at the present day it is especially in the old fashioned and long established unions that we find the most rigid enforcement of membership. Among the Coalminers it is the men of Northumberland, Durham and the West Riding of Yorkshire, strongly combined for a whole generation, who have set the fashion of absolutely refusing to 'ride' (descend in the cage) with non-unionists. In the best organized industries indeed, whether great or small, such as the Boilermakers, Flint Glass Makers, Tape-sizers, or staff-pressers—the very aristocracy of 'Old Unionists'—the compulsion is so complete that it ceases to be apparent. No man not belonging to the union ever thinks of applying for a situation, or would have any chance of obtaining one. It is, in fact, as impossible for a non-unionist plater or riveter to get work in a Tyneside shipyard, as it is for him to take a house in Newcastle without paying the rates. **This silent and unseen, but absolutely complete compulsion is the ideal of every Trade Union.** It is true that here and there an official of an incompletely organized trade may protest to the public, or before a Royal Commission, that his members have no desire that any workman should join the union except by his own free will. But, however bona fide may be these expressions by individuals, we invariably see such a union, as soon as it secures the adhesion of a

majority of its trade, adopting the principle of compulsory membership and applying it with ever greater stringency as the strength of the organization increases." (Emphasis ours.)

The exclusion of immigrants by the early American labor movement between 1886 and 1887 is cited in the continuation of Commons History of the Labor Movement in the United States, Vol. 4, by Perlman and Taft.

Exclusion of Rival Unionists.

The exclusion of members of rival unions has also been a characteristic of the labor movements.

Let us go to a classical work on the subject. In Series XXXIX of the Johns Hopkins Studies, Frank T. Stockton writes on "The Closed Shop in American Trade Unions." This work is dated 1911. He says in this work, page 66:

"**Members of rival unions.** When the trade or territorial jurisdiction claimed by two unions is identical or overlaps, the members of the two unions ordinarily refuse to work with each other. In 1898, for instance, the 'Baltimore organization' of painters in its struggle with the 'Lafayette organization' declared all painters affiliated with the Baltimore headquarters to be non-union men (Plant v. Wood, 176 Mass. 492, is cited in the footnotes). **Seceding local unions and the national union have always been especially hostile to one another.** When the trade unions from 1881 on began to demand independence from the Knights of Labor, the latter refused to allow members of the unions to be employed in the shops controlled by them. It was recognized very early that the closed shop might be a powerful weapon in many jurisdictional disputes. Among those in which it has been used in recent years are the disputes between the Glass Bottle Blowers and the Flint Glass Workers, between the United Brotherhood of Carpenters and the Wood Workers, between the Plumbers and the Steam Fitters, between the

Granite Cutters, the Stone Cutters and the Marble Workers, and between the Bricklayers and Masons and the Plasterers." (Emphasis ours.)

The same bitterness between unions was demonstrated in jurisdictional disputes.

"In commenting upon the constantly recurring jurisdictional disputes between trade unions, the editor of the Plumbers, Gas Fitters and Steam Fitters' Journal in 1896 lamented that less courtesy had ordinarily been shown to the holder of an 'opposition card' and that life had been made 'more bitter' for him than in the case of 'one who has always remained outside the pale of united labor and who has always been inamicable to its interests.' The unions have felt that when a non-unionist secures employment in a shop controlled by them, it will not ordinarily be difficult to induce him to join their ranks. **But the union in control is extremely reluctant to allow a member of a rival or hostile union to be employed in a shop. There is always the danger that he may win over the shop to his own union.**" (Emphasis ours.)

In another place Mr. Stockton, who gives both sides of the argument, comments that employers have learned that "one trial is enough to demonstrate the fact that members of rival unions tolerate each others' presence less than they do that of non-unionists."

The View of Mr. Leisserson.

William Leisserson, former member of the Board, who has given his lifetime to the study of labor problems has recognized that closed shop contracts which are sanctioned by the Act may have undesirable effects. However, he stated:

"It is for the Congress and not for the Board to make the modifications." See **Rutland Court Owners, Inc.**, 44 NLRB 587, l. c. 603.

He pointed out in a dissenting opinion in this case that if the closed shop clause of the Act is to be interpreted as forbidding exclusion from membership of employees who are hostile to the union, many provisions of union constitutions and by-laws will be invalidated. He cited, as example, the constitution of the United Mine Workers, which requires expulsion of any member in a long list of presumptively hostile organizations mentioning, among others, the Klu Klux Klan and the National Chamber of Commerce! A similar provision in the constitution of the International Brotherhood of Electrical Workers was cited by the Board without comment in **Ansley Radio Corp.**, 18 NLRB 1028, l. c. 1043, which constitution required expulsion of any member working in the interest of any organization opposed to the union.

Contemporary writers have recognized the existence of the trade union policy of excluding rival unionists as an incident to the closed shop.

Jerome Toner, in his book on "The Closed Shop" (Washington, D. C. 1942), recognizes the closed shop as an instrument of policy in intra-union rivalry. He says at page 163:

> "Several important functions of the closed shop have already been described. Another pertains to the control of employment opportunities. Here the contest is twofold: **First, and by far the fiercer, are jurisdictional disputes or intra-union wars.**" The second is, of course, the contest with the non-union worker. (Emphasis ours.)

At page 164 he says:

> "The trade jurisdiction is also protected by means of the closed shop, first, against nonunionists and, second, against unionists who are not members of the local or district council holding the contract."

At page 165 appears a sentence containing a significant parenthesis:

> "Under existing law the closed shop seems to be the only legal way by which a union can protect job opportunity for its members against the right of the individual non-unionists **(rival unionists of course have the same standing)** to make individual agreements with the employer."

Joel Seidman, in his book, "Union Rights and Union Duties" (New York 1943), discusses various types of exclusionary practices by unions. He says, at page 36:

> "Since a union is free to determine the qualifications for membership it can exclude undesired groups from union benefits by writing the prejudices of its members into constitution, ritual or by-laws and in a completely organized industry operating under closed shop contracts disbars them from employment."

He cites as examples of victims of such policy aliens, Asiatics, women, religious denominations (pp. 36-37). He then discusses negro exclusion (pp. 37-39) and political discrimination (p. 39). He refers to the provision of the constitution of the United Mine Workers barring communists (p. 39) and similar provisions in the by-laws of the Carpenters (p. 40).

See also, R. R. R. Brooks, "When Labor Organizes" (Yale Univ. Press, 1937), at page 224. He talks about the exclusionary policy of the closed union in conjunction with the closed shop and says:

> "In this respect the closed shop ceases to be an organization device designed to compel nonunion workers to support union policies, and becomes a method of limiting employment to those workers fortunate enough to be in the union at the time of the adoption of the closed union policy."

Pierson, F. C., in "Collective Bargaining Systems" (Washington, D. C. 1942), discusses at length union exclusions under closed shop agreements. He refers to the confusion of the court decisions but admits there is no rule of thumb to be followed. After speaking of the many factors to be considered by a court in ruling on closed shop agreements, he suggests, at page 53, that if the closed shop contract is designed to prevent the employer or employers from undermining the union, the agreeent should be held valid and then he has the following significant suggestion to make:

> "This approach would place burdens on the courts which they are not in a position to assume. Much discretion would rest with the individual judge. A simpler view would be to hold closed shop agreements invalid only under exceptional circumstances—where, for example, there is unmistakable evidence of fraud or of malicious design to injure or damage."

(3) Recent decisions of the state courts have interpreted the closed shop proviso of labor relations acts identical in terms to the National Labor Relations Act to evidence legislative approval of the closed shop with the following results:

(a) The policy recognized is a definite exception to the principle of a majority rule otherwise recognized in the Act.

(b) State courts which formerly held closed shop contracts to be contrary to public policy in the face of union monopoly of the employment, now no longer recognize monopoly as a ground for invalidating closed shop contracts.

Massachusetts adopted a Labor Relations Law in 1937 almost identical with the Federal Act. It has been held that: "The public policy of both the Act of Congress and

our statutes has been held to be the same.'" **Hathaway Bakeries, Inc., v. Labor Relations Commission** (1944), 55 N. E. (2d) 254, ... Mass. ....

The Supreme Judicial Court of Massachusetts has held that the closed shop proviso of the Act meant that the individual plaintiffs, who declined to join the union under a closed shop contract, had surrendered their individual rights, and that majority rule included the right of the majority to exclude the minority. **Hamer v. Nashawena Mills, Inc., et al.** (1943), 52 N. E. (2d) 22...

In this case the plaintiffs were employees of the mill which had, prior to 1943, been organized by an A. F. of L. union with a closed shop. When this contract with A. F. of L. terminated, an election was held and a CIO union was certified, and made a contract with the textile mills which also contained a closed shop clause. The contract gave employees thirty days in which to join. The suit was brought by employees of the mills who had been solicited to join the CIO, but who refused to join and refused to quit their jobs. (There was a saving clause in the contract that permitted employment of nonunion employees if they could not be replaced by the union.) The court said it was fairly inferable that if a supply of labor became available the plaintiffs would be discharged. The plaintiffs sought an injunction, which was denied by the court. The court said the defendant union had been elected by a majority of the employees of the bargaining unit, to which the plaintiffs belonged, and that the union was acting "not merely for its own members but as the representatives of all employees included in the unit." The court held the plaintiffs had surrendered to the union their right to deal individually. The execution of a closed shop agreement by this union was permissible, the court said, under the state and federal law, and the union had the right to determine working conditions, including authority to agree upon a closed shop.

The court pointed out that the defendant union was expressly designated by the National Labor Relations Act as the exclusive bargaining representative of all such employees, and said:

> "It would be strange if an employer, who is required to enter into negotiations for a contract with the designated union and who in the event that the execution of a contract results is bound to observe its terms and provisions, would not be able to enforce the contract which settled wages, hours of labor and other working conditions because he agreed with the union to conduct a closed shop. To set aside a contract upon that basis would be contrary to the public policy of the nation. * * * There is nothing in the plaintiff's contention that the defendant union was without power to execute a closed shop agreement."

The decision in this case is clearly contrary to the view of the court in the instant case, to the effect that the closed shop "was never intended to authorize the majority to discriminate against a minority because of prior union or antiunion activities." The case holds that the majority has a right to dictate a closed shop and thereby exclude such of the minority as fail to join the majority union.

The highest court in New York has held that the New York Labor Relations Law, with its proviso authorizing closed shop contracts, has recognized such contracts as in accord with public policy and in conjunction with the exemption of unions under the anti-trust laws, has resulted in legalizing the exclusion from employment of nonunion members, even where the union has an acknowledged monopoly of employment in the locality. The case is cited for two reasons: (1) Because it demonstrates that the rights of minorities must give way under the provisions of the closed shop clause to the institutional policy adopted, and (2) because the court holds that the remedy is legislative and not judicial.

New York has also adopted a labor relations act with a closed shop proviso similar to the clause in the federal act. The New York Act was adopted May 20, 1937, effective July 1, 1937.

This is the case of **Williams v. Quill** (1938), 277 N. Y. 1, 12 N. E. (2d) 547. This was an action by an employee of the transit lines in New York City against the President of the Transport Workers Union of America to enjoin that union from entering into a closed shop contract with the plaintiff's employer. An election had been held and the Transport Workers Union of America had been certified by the New York State Labor Board as the proper bargaining agency. The New York Labor Law was quoted, making it unfair labor practice for an employer to encourage membership in any labor union and also the proviso that nothing in the article should preclude an employer from making closed shop contracts. There was nothing in the case to indicate that any individual injury was sought or intended to the plaintiff but that the object of the contract and of the defendant union was to advance its own interest through the closed shop. The plaintiff's theory was that since the defendant union controlled all the main transit lines in the locality that a monopoly would be created which would deprive the plaintiff of any market for his labor. The judgment was for the defendants and the injunction was denied. The court declared:

> "The one reservation in this law is that the attempt to accomplish the end shall be carried out in good faith and for the declared purposes and not through malice or ill-will, or a desire to injure nonunion employees, or simply and solely for the purpose of keeping them out of work."

The court distinguished **Curran v. Galen**, 152 N. Y. 33, 46 N. E. 297, on the ground that in that case malice, ill-will and intended injury was involved. The court also

quoted **Jacobs v. Cohen**, 183 N. Y. 207, 76 N. E. 5, a closed shop case to the effect that a closed shop contract was legal, and said:

> "That, incidentally, it might result in the discharge of some of those employed for the failure to come into affiliation with their fellow-workmen's organization, or that it might prevent others from being engaged upon the work is neither something of which the employers may complain nor something with which the public policy is concerned."

It is interesting to note that the New York court in this case, citing the New York Labor Relations Law, stated that "it evidently recognized the existing law." The court was also influenced by the fact that the New York state laws against monopolies exempted labor unions, citing **Exchange Bakery etc. v. Rifkin**, 245 N. Y. 260, 157 N. E. 130. The court said, 12 N. E. (2d) 549:

> "This case has become the law of this state and has been followed in other instances. Therefore we approach this case in the light of the law as it was before Section 704 of the Labor Law was adopted, and we find that a labor organization is permitted to combine and strike in a particular industry for the purpose of obtaining employment for its own people, even to the extent of excluding others from the entire industry who are not union men."

The State of New Jersey has never adopted a labor relations act but has likewise abandoned and apparently overruled the cases such as **Wilson v. Newspaper and Mail Deliverers Union of New York**, supra (1938), 123 N. J. Eq. 347, 197 Atl. 720, holding that a closed shop contract is illegal if the union has a monopoly of the employment in the locality.

In **F. F. East Co. Inc. v. United Oystermen's Union** (1941), 130 N. J. Eq. 292, 21 Atl. (2d) 799, the highest

court in New Jersey reversed Vice Chancellor Sooy in the same case reported in 128 N. J. Eq. 27. The complaint alleged in this case that the closed shop contract of the Oystermen was monopolistic because 95 per cent of the employment was involved. It appeared that the union had not used coercion or any illegal acts and no complaint of exclusion was made. The Vice Chancellor had held the contract monopolistic and void, on the authority of many prior New Jersey cases, but on appeal the Court of Errors and Appeals reversed the case, citing **Kingston Trap Rock Co. v. International Local 825**, 129 N. J. Eq. 570, 19 Atl. (2d) 661. The court cited the state statute which prohibited injunctions against agreements requiring membership in a union as a condition of employment and also the National Labor Relations Act in the following words:

> "Moreover the contract is not against public policy. The National Labor Relations Act specifically authorized closed shop contracts. 49 Stat. 449, at 452; 29 U. S. C., section 758. This act is applicable in the instant case, because the complainants are engaged admittedly in interstate commerce. Our legislature has likewise declared such contracts lawful as a matter of public policy. N. J. S. A. 2:29-77.1 provides that no injunction shall issue prohibiting requirements that 'all employees of a particular employer or group of employers shall be members of a particular labor organization.' That clearly refers to closed shop contracts.
>
> "The contract under review being entirely lawful, it follows that the order appealed from be reversed."

VII.

The Problem Here Presented Is for the Legislature, Not for the Courts: The National Labor Relations Act Does Not Purport to Regulate Unfair Practices of Labor Unions, a Deficiency Which Has Been Recognized and Repaired in Recent State Legislation by Statutes Invalidating Closed Shop Contracts Where It Is Shown That the Union Unreasonably Excludes Employees From Membership; Also by Statutes Limiting Racial and Other Discriminatory Exclusions.

In the case of **National Labor Relations Board v. Jones & Laughlin Steel Corp.** (1937), 301 U. S. 1, 81 Law. Ed. 893, this court commented on the National Labor Relations Act in the following language:

> "The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. * * * But we are dealing with the power of Congress, not with the particular policy, or with the extent to which policy should go. We have frequently said that the legislative authority exerted within its proper field need not embrace all the evils within its reach."

The citation of any further authority is unnecessary to show that the Act does not purport to regulate the unfair practices or other practices of labor unions; the Act speaks for itself in that respect.

It has not only been suggested that the Act is deficient in its failure to regulate the conduct of trade unions, but the very danger of unreasonable exclusion by unions holding closed shop contracts has been recognized in recent state legislation similar to the National Labor Relations Act.

Furthermore, the recent legislation shows that it is the province of the legislature and not of the courts to supply the defect.

It was contended in the New York cases above cited, notably **Williams v. Quill**, supra, and **Miller v. Ruehl**, supra, that if the evil of exclusion by trade unions is to be reached, it is for the legislature and not for the courts; that the closed shop proviso contained in the New York Act, identical in wording to the Federal Act, evidences a policy favoring the closed shop with exclusion from employment, even where the union has a monopolistic position.

The earlier Labor Relations Acts of New York and Massachusetts contained no limitations upon closed shop contracts countenanced by the Act. These were adopted by New York on May 20, 1937, effective July 1, 1937, and by Massachusetts on May 29, 1937. Later legislation in other states has remedied the defect.

It is apparent that the legislatures of a number of states have felt that the closed shop proviso in its present form requires limitation if it is to prevent unreasonable exclusion by trade unions and hence exclusion from employment.

Pennsylvania. Probably the most significant legislation is that in the State of Pennsylvania. The Labor Relations Act of that state was adopted on June 1, 1937, Act 294, Public Laws, page 1168, and this act contained a definition of unfair labor practices which, in Section (), contained wording identical to that of Section 8 (3) of the federal law. In 1939 this section was amended by adding at the end of the proviso the following words:

"and if such labor organization does not deny membership in its organization to a person or persons who are employees of the employer at the time of making such agreement; provided such employee was not employed in violation of any previously existing agreement with said labor organization." Act of June 9, 1939, P. L. 162. Laws of Pennsylvania 1939, page 293.

Wisconsin. The employment Peace Act of Wisconsin, being Chapter 111 of the Wisconsin statutes, enacted by Chapter 57, Laws 1939, approved May 2, 1939, contained in Section 111.06 (c) a definition of unfair labor practices and prohibited employers from encouraging or discouraging membership in unions, with the proviso that "an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in the collective bargaining unit," and then followed a further proviso authorizing the Board to:

> "declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the Board." Wisconsin Statutes 1939, Sec. 111.06 (c).

The most recent acts which have been found contain similar limitations upon the closed shop clause:

Colorado adopted a state labor relations act, effective April 1, 1943, and in Section 6 (1) c, defining unfair labor practices, incorporated a proviso permitting employers to enter into "all union agreements" when three-fourths or more of its employees shall have voted affirmatively by secret ballot in favor of such all union agreement in a referendum conducted by the State Commission, and then added the following:

> "The commission shall declare any such all union agreement terminated whenever it finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer, and each such all union agreement shall be made subject to this duty of the Commission. Senate Bill 183, Laws 1943, effective April 1, 1943." 1943 Session Laws of Colorado, page 392.

Texas. The State of Texas, by House Bill 100, Laws of 1943, effective July 5, 1943, passed an act regulating labor unions, which contained the following proviso in Section 10:

> "Members' rights. It shall be unlawful for a labor union to refuse to give any one desiring membership a reasonable time, after obtaining the promise of employment, within which to decide whether or not he desires to become a member as a condition of such person's employment. No labor union may expel a member except for good cause and upon a fair and public hearing by the organization, after due notice and an opportunity to be heard on specific charges preferred. A court shall reinstate anyone expelled without good cause."

Section 8 of this Bill limits the collection of money or fees for the privilege of working. The proviso of this section stated: "Nothing hereinabove stated shall be construed to prevent a closed shop contract or other type of bargaining agreement or to limit the bargaining power of a labor union." Vernon's Texas Statutes, 1943 Supplement, Laws 48th Regular Session, Title 83, Art. 5154a.

Racial and Other Discrimination.

That legislative rather than judicial legislation is necessary to meet and regulate union rules excluding membership is also evidenced by recent statutes against the exclusion of employees from unions by reason of race, color or religion. Exclusion of union members by reason of hostility to the union is perhaps not so extreme in its unfairness as exclusion by a union on account of race, color or religion, as this exclusion invades ordinary civil rights.

New York State is the leader in this field of legislative reform. Its Labor Relations Law contains the provision:

> "No labor organization shall hereafter directly or indirectly by ritualistic practice, constitution or by-

law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, color or creed, or by regulations, practice, or otherwise deny to any of its members, by reason of race, color or creed, equal treatment with all other members in any designation of members to any employer for employment, promotion or dismissal by such employer." Chapter 6, Sec. 43, as added by Chapter 49, Sec. 1 of the Laws of 1940, effective Feb. 14, 1940.

Criminal penalties are attached to violation of this provision. The provision was held valid in **Railway Mail Assn. v. Corsi**, 1944, N. Y. Sup. Ct. App. Div., 8 Labor Cases, Sec. 62,311.

New York also has a statute forbidding discrimination on account of race, creed, color or national origin on national defense projects. Chapter 478, Laws of 1941, (amended to include "national origin" by Chapter 676 of the Laws of 1942).

The Labor Relations Law of Pennsylvania defines labor organizations and excludes from that definition any organization which, by any means, "denies a person or persons membership in its organization on account of race, creed or color or political affiliations." The "political affiliations" phrase was added by an amendment of May 27, 1943, Act No. 315, Laws of Pa. 1943, page 743.

The statutes of the State of Kansas provide that no labor organization which discriminates against, or bars, or excludes from its membership any person because of his race or color shall represent any unit of employees for collective bargaining purposes. Railroads and air carriers are excepted. 1941 Supplement to the General Laws, Annotated, of 1935, Sec. 44-801, Laws of Kans. 1941, page 428.

The labor laws of the State of Nebraska (Cumulative Supplement of 1941, to the Compiled Statutes of 1929, Sec. 48-801) provide that it is the policy of the state that no

representative agency of labor, in collective bargaining, shall discriminate against any person because of his race or color. The Department of Labor is charged with enforcement of this provision.

California and Illinois have passed statutes in connection with national defense work forbidding discrimination on account of race or color. The California Act applies to public works and also forbids discrimination on account of religion (Laws of 1939, Chapter 643, Sec. 1735). The Illinois statute applies to war defense contractors and forbids discrimination against any citizen of Illinois because of race or color. Ill. Revised Statutes of 1943 (State Bar Assoc. Ed.), Chapter 29, Sec. 24 (c); Smith-Hurd Ill. Annot. Statutes, Ch. 29, Sec. 24 (c).

Racial Exclusions Distinguished.

The exclusion of hostile employees or members of rival unions is to be distinguished from exclusions in violation of civil rights, such as racial discrimination, but even in this field *quaere* whether judicial application of constitutional policy should not wait on legislative action, already applied in several states.

As pointed out above, the National Labor Relations Act is directed at the establishment and protection of trade unions and it is therefore established that the strengthening of unions of working men is a national policy. Abuses of power by trade unions may appear requiring judicial disapproval and it would appear possible for the courts to hold that judicial ruling is necessary and appropriate where such abuses of privileges assured to unions are exercised in violation of civil rights. A suggestion to this effect is found in the article above referred to in 43 Col. L. Rev. 42, on "The Closed Union and the Right to work," by Ralph A. Newman. He cites the uniform holdings that courts will not interfere to require admission to unions of new members (p. 46):

> "In no case has admission to membership in such a situation been ordered in a common law jurisdiction."

Progressing to the cases where old members have been expelled, or present members sue to enjoin enforcement of invalid by-laws, he cites four cases where the courts relieved against by-laws such as expulsion for exercising political rights,[1] or unfair classification of members.[2]

The author concludes the remedy in any case is legislative, citing some of the statutes mentioned above and then adds (p. 54):

> "The suggestion is submitted that the National Labor Relations Act be amended so as to give to the Board supervisory powers over the reasonableness of admission requirements established by labor unions."

This court is to be concerned with the problem of racial discrimination. That problem is not here involved and is not for decision in this case. But the petitioner submits that whatever the decision may be as to the violation of civil rights in the application of closed shop contracts, the Congress has chosen not to limit or supervise the exercise of the power of exclusion by a union where the practice is to protect and strengthen the union. Certainly the employer should not be charged with so difficult a responsibility.

Trade unions are now protected by law, pursuant to the long recognized principle that solidarity is essential to them in the economic conflict.

Scopes v. Helmar (1933), 205 Ind. 596, 187 N. E. 662, 663; Interborough Rapid Transit v. Lavin (1928), 247 N. Y. 65, 79, 159 N. E. 863, 868; Goldfinger v. Feintuch (1937), 276 N. Y. 281, 286, 11 N. E. (2d) 910, 913.

It is submitted that in adopting the National Labor

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1 Spayd v. Ringing Rock Lodge (1921), 270 Pa. 67, 113 Atl. 70.
2 Cameron v. International Alliance, supra.

Relations Act, Congress intended to affirm this policy. It might have limited the privileges conferred. It might have said, "These unions now so privileged and protected, are custodians of the individual right to work and we will also protect this right." Congress did not do so. Congress adopted the closed shop and the right to exclude, to strengthen the institution, and sacrificed to that extent any concern for the right of the individual against the institution. The moral and social justification for the closed shop rests on the need of sacrificing personal interest to group welfare. Toner, op. cit., p. 173.

Congress consciously and expressly adopted the status quo. It is a matter for legislative action. Certainly it is not a matter to be placed in the hands of employers. The suggestion of the Circuit Court of Appeals that it was the duty of the employer in this case to "protect" the minority is not only contrary to the purpose of Congress in enjoining a "hands off" policy; it is also a dangerous suggestion to place in the hands of an employer who has been bedeviled, as in this case, with competing unions, to decide between the contending factions and futile to require the employer to insist that, after intense industrial conflict, the contending parties accept their rivals into membership.

VIII

The Court Erred in Its Failure to Recognize That the Board in This Case Was Passing Upon the Validity of Its Own Acts and in Such a Case Should Not Be Entitled to the Benefit of the Presumption That Its Findings Are Valid If Supported by Substantial Evidence, But, on the Contrary, All the Evidence Should Be Considered.

This brief is already entirely too long and the petitioner can only suggest in bare outline the reasons why the court below should have considered all the evidence rather than

resting satisfied with the inferences of the Board, on circumstantial evidence, holding the employer guilty and penalizing him for a solution of his dilemma, which solution erred, if at all, on the side of recognition of the Board's certification and compliance with his settlement and contractual obligation.

To a large extent the Board in this case was passing upon the validity of its own acts and the conduct of its own agents. The parties had resorted to the Board itself for approval of the settlement agreement and the Board had approved in writing the withdrawal of the charges and the arbitration of the question of representation. The Board placed the employer in the position of requiring it to bargain with a certified agent and then penalized him for doing so. While the Board did not itself repudiate the settlement, it sponsored in its complaint the repudiation of the settlement by the CIO after it had lost. It has consistently refused to face its own responsibility and that of its agents in such a case, and lightly passes over the dangerous consequences if the public with which it deals loses confidence in its scrupulous regard for simple doctrines of fair play. The Board and the Court alike have placed light value upon the obligation of contracts.

Armed as it is and entrusted with the responsibility of making conclusive findings of fact even upon circumstantial and hearsay evidence as in this case, the possibilities inherent in the exercise of its power, if it is allowed to repudiate its own agents, is manifestly vast in its implications.

There is not much authority on this point. The language above used appears in the opinion of the court in **N. L. R. B. v. Sun Shipbuilding and Dry Dock Co.** (CCA 3rd, 1943), 135 Fed. (2d) 15, where the Board disestablished a bargaining agent which was the duly certified choice of a majority of the employees as the result of an election con-

ducted by the Board. In other words, the case did not involve a contractual settlement agreement. The court said, page 18:

> "But manifestly the possibilities inherent in the exercise of such power upon a complaint filed long after a theretofore unquestioned certification and for matters which allegedly occurred in the formation of the bargaining agent prior to the election, are so vast in their implications as to require an especially detailed scrutiny of the evidence in order that it may be determined with reasonable certainty whether the findings whereon the Board directs disestablishment in such circumstances are justified."

It will serve no purpose to cite the opinions of this Court on the limits to which administrative tribunals will be permitted to extend their discretion. The gist of the cases is understood as holding that the court will not hesitate to review a record to determine whether the elementary principles of fair play have been followed.

Morgan v. U. S. (1938), 304 U. S. 1, 82 Law. Ed. 1129; **U. S. v. Abilene & S. R. R. Co.**, 265 U. S. 274, 286-290, 68 Law. Ed. 1016, 1021-1023; **St. Joseph Stock Yards Co. v. U. S. A. and the Secretary of Agriculture** (1935), 298 U. S. 38, 80 Law. Ed. 1032; **N. L. R. B. v. Jones & Laughlin Steel Corp.** (1937), 301 U. S. 1, 81 Law. Ed. 893, at 917.

The following brief considerations are offered to this Court in support of the contention that all the evidence in this case should be considered before the petitioner should be held guilty of unfair practice and drastic penalties assessed.

1. The company was here the unhappy battleground of industrial strife. In the face of the company's lawful demand for a Labor Board election the CIO chose industrial warfare resulting in bitterness and antagonism. The prin-

cipal industries in town were tied up for months. The independent union was born of the strike under conditions where the court might reasonably conclude that the employees, and indeed the locality, were not ready for such stringent measures. The court might reasonably conclude that the Board should have considered these circumstances in insisting upon an almost Prussian discipline on the part of the company's employees.

2. In any case the course of action of the company was in good faith. The settlement which it made should not be outlawed. The company resorted to the Board itself which was fully advised of the facts. This was no secret treaty. The company reluctantly accepted the terms which were imposed and reposed confidence in the Board to adjudicate the question of both bargaining agent and the complaint of employee Dodrill. Its subsequent dealings were with a certified union, and it observed what it considered to be its legal and contractual obligations.

3. The effect of the Board's decision is not only to undermine confidence in the Board's scrupulous regard for contractual agreements, but might well be construed to encourage any militant union to believe that it could go through the motions of making strike settlements and arbitrating the question of representation, and then, if it lost the arbitration, to resort to the Board to set aside the settlement in case of an unfavorable outcome. This is a standard of conduct which is not countenanced by ordinary business and commercial standards. It certainly should not be countenanced by an agency of the United States which is charged with the difficult task of protecting and representing labor unions while retaining the confidence of all groups. These conflicts between economic forces (not always so irreconcilable as they appear to the protagonists) can certainly be resolved without departing from the principles of fair dealing upon which our basic unity depends.

The petitioner, therefore, respectfully submits that the settlement should be upheld and the company exonerated from liability for the harsh results of a union policy reluctantly accepted both by the company and by the Legislature.

Respectfully submitted,

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